# Chan King Yu v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–29 OF 2005(W)
ABDUL AZIZ MOHAMAD, HASHIM YUSOFF AND ZULKEFLI FCJJ
14 NOVEMBER 2008

*Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Sharp difference in evidence of police witness and defence witness — Whether discrepancies in prosecution case caused defence to succeed in raising reasonable doubt — Whether trial judge and judges of Court of Appeal failed to consider and evaluate entire evidence in light of material discrepancies*

*Evidence — Adverse inference — Failure to call material witness — Whether adverse inference ought to be invoked against prosecution*

*Evidence — Hearsay — Admissibility — Police arrested appellant on information received — Whether such information was hearsay — Whether information prejudicial to appellant — Whether trial judge and judges of Court of Appeal erred in acting on hearsay evidence*

The appellant, a Hong Kong national was convicted in the High Court for the offence of trafficking in 9,103.9g of methamphethamine ('dangerous drug') and sentenced to death as provided by s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The offence was alleged to have been committed in Room 1303 of the Hotel Nova in Kuala Lumpur on 19 June 2000. The prosecution's evidence consisted of the police receiving information on the morning of 19 June 2000 that a Chinese male from Hong Kong by the name of Chan King Yu would be trafficking in dangerous drugs at a hotel in Kuala Lumpur on that very day. The police were also provided with a photograph to identify him. At about noon on the same day, when further information was received that the appellant was staying at Hotel Nova, a team of police personnel were sent to the hotel to keep surveillance of the appellant. At about 12.25pm the appellant was seen emerging from the hotel and entering a shopping complex and when he returned to the hotel he was seen carrying a suitcase which bore the brand name 'Polo' ('the Polo bag'). At about 5.30pm the appellant was again reported to have left the hotel and to have returned at about 7.20pm carrying three plastic bags. About five or ten minutes later the appellant was reported to have re-emerged from his hotel

room carrying a plastic bag which he placed in a dustbin near the hotel. When this plastic bag was recovered it was found to contain a metal lid, some tin foil and a card. Between 8 to 8.30pm the ambush party had positioned themselves in the stairway between the twelfth and thirteenth floors of the hotel. At that time they again received information from the surveillance team that the appellant had left the hotel again. When two members of the ambush party went up to Room 1303 they found the door locked. When the appellant returned to the hotel at about 8.50pm the ambush party who were laying in wait tried to gain entry into the room. However, they failed even with the assistance of the hotel staff and had to break open the lock to the room door. Upon entering the room the police recovered several items including a small packet of drugs found on the bedside table and the Polo bag which contained three plastic bags; each of these plastic bags was found to contain a cylinder wrapped in tin foil and each cylinder in turn contained four small parcels of white substance which upon subsequent chemical analysis showed to be the dangerous drugs. Based on these facts the High Court judge ruled that a prima facie case of actual possession had been established under s 37(da) of the Act.

The appellant in his defence maintained that he only discovered that the three cylinders contained dangerous drugs after the police had opened them and showed him their contents. According to him, he was sent by his employer in Hong Kong to collect money from the latter's client and he had been met at the airport by one of those clients, one Man Chai. According to the appellant, he had first checked into another hotel but as instructed by Man Chai had then checked into Hotel Nova. The appellant's version about the three cylinders was that he had received a request from Man Chai on his mobile to collect some machinery parts and that the plastic bags and their contents belonged to Man Chai who was supposed to come to the hotel later and collect it. Even in his cautioned statement the appellant mentioned Man Chai's name and gave his telephone number. The appellant said that he had bought the Polo bag to accommodate some souvenirs, including four or five ladies' handbags that he had bought to take back to Hong Kong, because there was insufficient room in his suitcase. This evidence was corroborated by the appellant's girlfriend who was then residing in Hong Kong. She also gave evidence that the appellant had been sent to Malaysia by his employer to collect money. The appellant denied knowledge of the drugs in the cylinders and of how they got into the Polo bag. He also maintained that when the police found the three cylinders they all had lids and that it had required the strength of two officers to remove a lid. He further denied having put a lid in a plastic bag and depositing the bag in the rubbish bin outside the hotel. As for the small plastic cover containing the drug that was found on the bedside table, the appellant said that it was not there when he came into the room at about 9pm. At the close of the defence case, the appellant submitted that the case against him had been fixed by the prosecution witnesses ie the

police and that the evidence against him was a plant on someone's part. Bound up with that submission was the question of the involvement in this case of one DSP Yap Seng Hock ('DSP Yap'), who had no part in the trial. The said DSP Yap was not one of the prosecution witnesses but according to the evidence of a defence witness ('Tan') who was working at Hotel Nova, DSP Yap had checked into Room 1310 at the hotel at 6.30pm on 19 June 2000. According to Tan, he was approached at 8.40pm by members of the ambush party and asked to open the door to Room 1303. Tan also said that DSP Yap was together with the members of the ambush party when he used the master key-card to open the door to Room 1303 to them. Tan's evidence on this aspect of the case differed from the police evidence in that according to him the entry to Room 1303 was plain sailing and effected simply by the use of the master key by him whereas according to the police there was much ado in gaining entry and entry was gained only when the appellant himself finally opened the door. Since the two versions conflicted the appellant submitted that Tan's evidence was about an earlier entry when the door was opened by using a master key in the appellant's absence and that Tan was not involved in the second occasion which was a later entry when the appellant had returned to his room. The hotel's front office manager ('Samad') who also testified as a defence witness said that he was informed by DSP Yap that he had occupied Room 1310 for only a few hours and that this was to enable him to carry out the police raid in the hotel. Samad further testified that the entry into the hotel rooms was by a key-card, that each occupant held a key-card and that each time the key card was inserted to the room door it will be recorded. However, Samad was not able to verify the number of times an entry was made into Room 1303 on 19 June 2000 because the lock to the room was damaged by the police. When the appellant was convicted by the High Court he appealed to the Court of Appeal which held that the combined strength of the individual strands of evidence in this case established that the appellant had mens rea possession and that therefore the trial judge was correct in invoking and applying the presumption under s 37(da) of the Act to hold that the appellant had committed the offence of trafficking. Hence this appeal wherein the appellant contended that the trial judge and the judges of the Court of Appeal had failed to consider and evaluate the entire evidence and the glaring material discrepancies in the prosecution's case when convicting him. The main issue for consideration before this court was whether the infirmities and discrepancies in the prosecution's case had caused the defence to succeed in raising a reasonable doubt on the prosecution's case.

**Held**, allowing the appeal, acquitting and discharging the appellant:

(1) (per **Zulkefli FCJ**, majority judgment) The evidence adduced by the prosecution witnesses showed that the police team was in fact acting on

information received to effect the arrest and detention of the appellant. From the findings in the judgment of both the High Court and the Court of Appeal it was seen that both courts had acted on evidence of information received which was clearly hearsay evidence and prejudicial to the appellant and therefore inadmissible (see para 75).

(2) (per **Hashim** and **Zulkefli FCJJ**) Although Man Chai's photograph and telephone number were available, the police failed or refused to investigate Man Chai but neither the High Court nor the Court of Appeal considered this fact in their findings. Since Man Chai was not a fictitious character but had played a key role in leading the police to effect arrest on the appellant and since material particulars relating to the existence of Man Chai had been disclosed by the appellant in his cautioned statement, the police had all the time to check its veracity. The burden was on the prosecution to check whether the appellant's version of the facts as it appeared in the cautioned statement was true or false (see paras 77 & 83–84).

(3) (per **Hashim FCJ**) Tan had testified that at about 8.40pm two officers from the ambush party had approached him to open the door to Room 1303 and that he had opened the door to the room in the presence of one DSP Yap and the ambush party laying in wait. This piece of evidence that was relied upon by the appellant to suggest that there was an earlier entry by the police into the appellant's room when he was absent from his room between 7.30pm to about 8.50pm, would give rise to a reasonable doubt as to whether there was such an earlier entry into the room by the police when it was opened by Tan using the master key-card. In this case it must also be borne in mind that Tan was giving evidence as to what actually transpired and that there was no evidence to suggest that he was an interested party who was giving evidence to help the appellant or to discredit the police (see para 50).

(4) (per **Zulkefli FCJ**) The trial judge and the judges of the Court of Appeal had chosen to believe the testimony of the police witnesses but gave no reasons for rejecting the evidence of the two hotel staffs, Tan and Samad, who were the defence witnesses. The defence witnesses were independent witnesses and had no reason or interest to lie. The version of events by the prosecution's witnesses and the evidence of Tan who opened the door of Room 1303 for the police suggested that there was a clear fabrication of evidence by the police witnesses. The police witnesses suggested that Tan opened the door for them and was present during the second raid but this was a lie because if the door was occupied and locked from the inside it can only be opened by an emergency key. However, on the night in question the emergency key was never used at any time (see paras 89 & 98).

(5) (per **Zulkefli FCJ**) Tan's evidence that DSP Yap was present at the hotel and in Room 1303 on 19 June 2000 was also corroborated by the evidence of Samad who had stated that DSP Yap informed him that he had occupied Room 1310 for a few hours to carry out the raid in the hotel. In fact there was documentary proof that conclusively showed that DSP Yap had checked into Room 1310 and this evidence was not rebutted by the prosecution at all. In the circumstances there had been a failure by the prosecution to call a material witness ie DSP Yap to give evidence for the prosecution and hence a justifiable case for the defence to invite the invocation of adverse presumption under s 114(g) of the Evidence Act 1950 against the prosecution's case (see para 104).

(6) (per **Zulkefli FCJ**) The plastic bag with its contents that was recovered from the dustbin where the appellant had allegedly thrown it was not sent to the fingerprint department for analysis at all. Despite this the trial judge and the judges of the Court of Appeal never once considered the failure of the police to send this vital piece of evidence for fingerprint analysis. In addition there appeared no reason why the appellant should choose to dispose the plastic bag and its contents into a dustbin outside the hotel when there were dustbins in his room and outside the room along the corridor of the hotel. Moreover, the plastic bag with its contents was discovered in a public dustbin which was accessible to any member of the public (see paras 105–106).

(7) (per **Hashim FCJ** and **Zulkefli FCJ**) Although in an appeal findings of facts by the trial court are seldom disturbed, the evidence in this appeal showed that a reasonable doubt had been raised by the defence which necessitated an interference. As the trial judge had not viewed the whole of the evidence objectively and from all angles the appellant had lost the chance of being acquitted. In fact the appellant had maintained from the time of his arrest that he had no knowledge of the drugs found in the plastic bags because he genuinely believed that these plastic bags contained tools and belonged to the person named Man Chai. From this it was clear the appellant's defence was not a bare denial but an explanation indicating that the drugs could have belonged to Man Chai who could have been the trafficker and that the appellant was at most an innocent carrier (see paras 52 & 109).

(8) (per **Abdul Aziz Mohamad FCJ**, dissenting) The sharp differences between the narratives of the prosecution witness and the defence witness led the appellant to submit that there must have been two entries. Whatever may have been the reason for the sharp differences between the evidence of the police witness and Tan as to the events culminating in the entry of the police into Room 1303, including the differences as regards DSP Yap, the fact remained that when the police entered the room when the appellant was in, they found the exhibits to

be in the state they were in as described by the police witnesses and this proved that the appellant knew that the three cylinders contained the drugs (see para 33).

(9) (per **Abdul Aziz Mohamad FCJ**, dissenting) The trial judge in this case was not swayed by the information that the police received. From the judgment it was clear that the trial judge's decision to reject the defence was made upon an objective consideration of all the admissible evidence, from which he found that the appellant was in possession of the drugs. He therefore rejected the defence which involved Man Chai because with the finding that the appellant was in possession of the drugs it made no difference to his guilt if he was keeping the drugs for Man Chai to come to the hotel to collect later (see para 39).

**[Bahasa Malaysia summary**

Perayu, seorang warganegara Hong Kong telah disabitkan di Mahkamah Tinggi kerana kesalahan mengedar 9,103.9g methamphethamine ('dadah berbahaya') dan dihukum mati seperti yang diperuntukkan oleh s 39B(2) Akta Dadah Berbahaya 1952 ('Akta'). Kesalahan itu dikatakan telah dilakukan dalam Bilik 1303 Hotel Nova di Kuala Lumpur pada 19 Jun 2000. Keterangan pihak pendakwaan menunjukkan polis menerima maklumat pada pagi 19 Jun 2000 bahawa seorang lelaki berbangsa Cina dari Hong Kong bernama Chan King Yu akan mengedar dadah berbahaya di sebuah hotel di Kuala Lumpur pada hari tersebut. Pihak polis juga diberikan gambar foto untuk mengenalinya. Lebih kurang tengah hari pada hari yang sama, apabila maklumat lanjut diterima bahawa perayu sedang menetap di Hotel Nova, sepasukan polis dihantar ke hotel itu untuk mengawasi perayu. Lebih kurang pukul 12.25 tengahari perayu kelihatan muncul dari hotel itu dan memasuki kompleks membeli-belah dan apabila dia kembali ke hotel itu kelihatan dia membawa beg pakaian berjenama 'Polo' ('beg Polo'). Lebih kurang pukul 5.30 petang perayu sekali lagi dilaporkan telah meninggalkan hotel itu dan kembali lebih kurang pukul 7.20 petang dengan membawa tiga beg plastik. Lebih kurang lima atau sepuluh minit kemudian perayu dilaporkan telah muncul semula dari bilik hotelnya dengan membawa satu beg plastik yang diletaknya dalam bakul sampah berdekatan hotel itu. Apabila beg plastik ini ditemui ia didapati mengandungi tudung logam, sedikit kertas timah dan sekeping kad. Antara pukul 8 hingga 8.30 malam pasukan serang hendap telah bersedia di tangga antara tingkat ke-12 dan ke-13 hotel itu. Pada masa itu mereka sekali lagi telah menerima maklumat daripada pasukan pengawasan bahawa perayu telah meninggalkan hotel itu. Apabila dua ahli pasukan serang hendap naik ke Bilik 1303 mereka mendapati pintu itu berkunci. Apabila perayu kembali ke hotel itu lebih kurang pukul 8.50 malam pasukan serang hendap yang sedang sedia menunggu telah cuba memasuki bilik itu. Walau bagaimanapun, mereka

gagal meskipun dengan bantuan pekerja hotel dan terpaksa memecah masuk bilik hotel itu. Sejurus memasuki bilik itu polis menemui beberapa barangan termasuklah bungkusan kecil dadah didapati terletak di meja tepi katil dan beg Polo yang mengandungi tiga beg plastik; setiap beg plastik tersebut didapati mengandungi silinder yang dibalut dengan kertas timah dan setiap silinder mengandungi empat bungkusan kecil bahan putih yang setelah menjalani analisis kimia merupakan dadah berbahaya. Berdasarkan fakta tersebut hakim Mahkamah Tinggi memutuskan bahawa kes prima facie milikan sebenar telah dibuktikan di bawah s 37(da) Akta tersebut.

Perayu dalam pembelaannya menegaskan bahawa dia hanya menyedari yang tiga silinder itu mengandungi dadah berbahaya setelah polis membukanya dan menunjukkan kandungannya kepadanya. Menurutnya, dia telah dihantar oleh majikannya di Hong Kong untuk mengutip wang daripada pelanggan majikannya dan dia telah bertemu dengan salah seorang pelanggan tersebut, bernama Man Chai di lapang terbang. Menurut perayu, dia pada mulanya telah mendaftar masuk ke dalam hotel lain tetapi setelah diarahkan oleh Man Chai kemudiannya telah mendaftar masuk ke dalam Hotel Nova. Versi perayu tentang ketiga-tiga silinder tersebut adalah bahawa dia telah menerima permintaan daripada Man Chai pada telefon bimbitnya untuk mengambil beberapa bahagian mesin dan bahawa beg-beg plastik dan kandungannya dimiliki oleh Man Chai yang sepatutnya datang ke hotel itu kemudian dan mengambilnya, Bahkan dalam kenyataan beramarannya perayu telah menyebut nama Man Chai dan memberikan nombor telefonnya. Perayu menyatakan bahawa dia telah membeli beg Polo itu untuk memasukkan beberapa cenderamata, termasuklah empat atau lima beg tangan wanita yang telah dibelinya untuk dibawa balik ke Hong Kong kerana beg pakaiannya tidak muat. Keterangan ini telah disokong oleh teman wanita perayu yang pada masa itu menetap di Hong Kong. Sia juga telah memberi keterangan bahawa perayu telah dihantar ke Malaysia oleh majikannya untuk mengutip wang. Perayu menafikan mempunyai pengetahuan tentang dadah dalam silinder dan bagaimana ia terdapat dalam beg Polo itu. Dia juga menegaskan bahawa apabila polis menjumpai ketiga-tiga silinder itu kesemuanya mempunyai tudung dan ia memerlukan tenaga dua orang pegawai untuk membuka tudung itu. Dia selanjutnya menafikan telah meletak tudung itu dalam beg plastik dan membuang beg itu ke dalam tong sampah di luar hotel itu. Berhubung penutup plastik kecil mengandungi dadah yang didapati di meja tepi katil itu, perayu menyatakan bahawa ia tidak berada di situ semasa dia masuk ke bilik lebih kurang pukul 9 malam. Di penutup kes pembelaan, perayu menghujahkan bahawa kes terhadapnya telah ditetapkan oleh saksi-saksi pihak pendakwaan iaitu polis dan bahawa keterangan terhadapnya adalah perangkap untuk seseorang. Bersama penghujahan itu juga adalah persoalan tentang penglibatan DSP Yap Seng Hock ('DSP Yap') dalam kes ini, yang tiada kaitan dalam perbicaraan ini. DSP Yap bukan salah seorang daripada saksi pihak pendakwaan tetapi

menurut keterangan saksi pihak pembelaan ('Tan') yang bekerja di Hotel Nova, DSP Yap telah memeriksa Bilik 1303 di hotel itu pada pukul 6.30 petang pada 19 Jun 2000. Menurut Tan, ahli pasukan serang hendap telah berjumpa dengannya pada pukul 8.40 malam dan meminta untuk pintu Bilik 1303 dibuka. Tan juga mengatakan bahawa DSP Yap bersama dengan ahli pasukan serang hendap semasa dia menggunakan kad kunci utama untuk membuka pintu Bilik 1303 untuk mereka. Keterangan Tan tentang aspek kes ini berbeza dengan keterangan polis di mana menurutnya kemasukan ke dalam Bilik 1303 berjalan dengan lancar dan dilakukan dengan mudah menggunakan kunci utama olehnya walhal menurut polis ianya sukar untuk dapat masuk dan kemasukan hanya diperoleh apabila perayu sendiri akhirnya membuka pintu itu. Memandangkan kedua-dua versi itu bercanggah perayu menghujahkan bahawa keterangan Tan adalah tentang kemasukan terdahulu apabila pintu itu dibuka dengan menggunakan kunci utama semasa perayu tiada dan bahawa Tan tidak terlibat dalam kejadian kedua yang merupakan kemasukan kemudiannya semasa perayu telah pulang ke biliknya. Pengurus Pejabat Hadapan hotel ('Samad') yang juga telah memberikan keterangan sebagai saksi pihak pembelaan mengatakan bahawa dia diberitahu oleh DSP Yap bahawa dia menetap di Bilik 1310 untuk hanya untuk beberapa jam dan bahawa ini adalah untuk membolehkannya melaksanakan serbuan polis di hotel itu. Samad selanjutnya memberikan keterangan bahawa kemasukan ke dalam bilik-bilik hotel adalah melalui kad kunci, di mana setiap penghuni memegang kad kunci dan setiap kali kad kunci dimasukkan ke dalam pintu bilik ia akan direkodkan. Walau bagaimanapun, Samad tidak dapat mengesahkan berapa kali kemasukan berlaku ke Bilik 1303 pada 19 Jun 2000 kerana kunci kepada bilik itu telah dirosakkan oleh polis. Apabila perayu disabitkan oleh Mahkamah Tinggi dia telah merayu ke Mahkamah Rayuan yang memutuskan gabung kekuatan setiap keterangan berasingan dalam kes ini membuktikan bahawa perayu mempunyai mens rea milikan dan oleh itu hakim perbicaraan adalah betul dalam menggunakan dan memakai andaian di bawah s 37(da) Akta untuk memutuskan bahawa perayu telah melakukan kesalahan pengedaran dadah. Justeru itu rayuan ini dibuat di mana perayu menegaskan bahawa hakim perbicaraan dan hakim-hakim Mahkamah Rayuan telah gagal mempertimbangkan dan menilai keseluruhan keterangan dan percanggahan penting yang jelas dalam kes pihak pendakwaan semasa menyabitkannya. Isu utama untuk dipertimbangkan di hadapan mahkamah ini adalah sama ada kelemahan dan percanggahan dalam kes pihak pendakwaan telah menyebabkan pihak pembelaan berjaya menimbulkan keraguan munasabah ke atas kes pihak pendakwaan.

**Diputuskan**, membenarkan rayuan, melepaskan dan membebaskan perayu:

(1) (oleh **Zulkefli HMP**, penghakiman majoriti) Keterangan yang dikemukakan oleh saksi-saksi pihak pendakwaan menunjukkan bahawa

pasukan polis sememangnya bertindak atas maklumat yang diterima untuk melakukan tangkapan dan tahanan ke atas perayu. Berdasarkan penemuan dalam penghakiman kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan dilihat bahawa kedua-dua mahkamah telah bertindak atas keterangan maklumat yang telah diterima yang jelas adalah keterangan dengar cakap dan bersifat prejudis terhadap perayu dan oleh itu tidak boleh diterima (lihat perenggan 75).

(2) (oleh **Hashim** dan **Zulkefli HHMP**) Meskipun adanya gambar foto dan nombor telefon Man Chai, polis gagal atau enggan menyiasat Man Chai tetapi Mahkamah Tinggi mahupun Mahkamah Rayuan tidak mengambil kira fakta ini dalam penemuan mereka. Memandangkan Man Chai bukan watak rekaan tetapi memainkan peranan utama dalam membawa pihak polis kepada tangkapan perayu dan memandangkan butiran penting berkaitan kewujudan Man Chai telah didedahkan oleh perayu dalam kenyataan beramarannya, pihak polis perlu pada setiap masa memeriksa kebenaran cakapnya. Beban terletak pada pihak pendakwaan untuk memeriksa sama ada versi fakta perayu seperti yang terdapat dalam kenyataan beramaran adalah benar atau palsu (lihat perenggan 77 & 83–84).

(3) (oleh **Hashim HMP**) Tan telah memberikan keterangan bahawa lebih kurang pukul 8.40pm dua orang pegawai daripada pasukan serang hendap telah datang kepadanya untuk membuka pintu Bilik 1303 dan bahawa dia telah membuka pintu bilik itu dengan kehadiran DSP Yap dan pasukan serang hendap yang sedang siap sedia menunggu untuk bertindak. Keterangan ini digunakan oleh perayu untuk mencadangkan bahawa terdapat kemasukan terdahulu oleh pihak polis ke dalam bilik perayu semasa dia tiada dalam biliknya antara pukul 7.30 malam hingga lebih kurang pukul 8.50 malam, yang menimbulkan keraguan munasabah tentang sama ada terdapat kemasukan terdahulu dalam bilik itu oleh polis apabila ia dibuka oleh Tan menggunakan kunci kad utama. Dalam kes ini perlu juga diingat bahawa Tan memberikan keterangan tentang apa yang sebenarnya berlaku dan bahawa tiada keterangan untuk mencadangkan dia adalah pihak berkepentingan yang memberikan keterangan untuk membantu perayu atau mencemarkan nama baik pihak polis (lihat perenggan 50).

(4) (oleh **Zulkefli HMP**) Hakim perbicaraan dan hakim-hakim Mahkamah Rayuan telah memilih untuk mempercayai testimoni saksi-saksi polis tetapi tidak memberikan sebab untuk menolak keterangan dua pegawai hotel, Tan dan Samad, yang merupakan saksi-saksi pihak pembelaan. Saksi-saksi pihak pembelaan adalah saksi-saksi berasingan dan tidak mempunyai sebab atau kepentingan untuk berbohong. Versi-versi kejadian oleh saksi-saksi pihak pendakwaan dan keterangan Tan yang membuka pintu Bilik 1303

untuk polis mencadangkan bahawa jelas terdapat keterangan yang direka-reka oleh saksi-saksi polis. Saksi-saksi polis mencadangkan bahawa Tan telah membuka pintu untuk mereka dan hadir semasa serbuan kedua tetapi ini merupakan satu penipuan kerana jika pintu itu didiami dan dikunci dari dalam ia hanya boleh dibuka dengan kunci kecemasan. Walau bagaimanapun, pada malam yang dipersoalkan kunci kecemasan tidak pernah digunakan pada bila-bila masa (lihat perenggan 89 & 98).

(5) (oleh **Zulkefli HMP**) Keterangan Tan bahawa DSP Yap hadir di hotel dan dalam Bilik 1303 pada 19 Jun 2000 juga disokong oleh keterangan Samad yang menyatakan bahawa DSP Yap telah memberitahunya yang dia menetap di Bilik 1310 untuk beberapa jam bagi menjalankan serbuan dalam hotel itu. Bahkan terdapat bukti dokumentar secara konklusif menunjukkan DSP Yap telah mendaftar masuk ke Bilik 1310 dan keterangan ini tidak langsung dipatahkan oleh pihak pendakwaan. Dalam keadaan ini terdapat kegagalan oleh pihak pendakwaan untuk memanggil saksi utama iaitu DSP Yap untuk memberikan keterangan bagi pihak pendakwaan dan justeru itu terdapat kes yang boleh dijustifikasikan bagi pihak pembelaan untuk menunjukkan penggunaan andaian bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap kes pihak pendakwaan (lihat perenggan 104).

(6) (oleh **Zulkefli HMP**) Beg plastik dengan kandungannya yang dijumpai dalam tong sampah di mana perayu dikatakan telah membuangnya tidak langsung dihantar ke jabatan cap jari untuk dianalisis. Meskipun ini hakim perbicaraan dan hakim-hakim Mahkamah Rayuan tidak sekalipun mengambil kira kegagalan pihak polis menghantar keterangan penting ini untuk analisis cap jari. Tambahan tiada sebab kenapa perayu patut memilih untuk membuang beg plastik dan kandungannya ke dalam tong sampah di luar hotel itu apabila terdapat tong sampah dalam biliknya dan di luar bilik sepanjang koridor hotel itu. Bahkan, beg plastik dan kandungannya itu dijumpai dalam tong sampah awam yang boleh digunakan oleh orang awam (lihat perenggan 105–106).

(7) (oleh **Hashim** dan **Zulkefli HHMP**) Meskipun dalam rayuan penemuan fakta oleh mahkamah perbicaraan jarang diganggu, keterangan dalam rayuan ini menunjukkan terdapat keraguan munasabah telah dibangkitkan oleh pihak pembelaan yang mewajarkan campur tangan. Memandangkan hakim perbicaraan tidak meneliti keseluruhan keterangan sewajarnya dan daripada semua sudut perayu telah hilang peluang untuk dibebaskan. Bahkan perayu telah menegaskan dari saat tangkapannya bahawa dia tiada pengetahuan tentang dadah yang dijumpai dalam beg-beg plastik itu kerana dia secara jujur mempercayai bahawa beg-beg plastik itu mengandungi

peralatan dan dimiliki oleh seorang yang bernama Man Chai. Berdasarkan ini jelas bahawa pembelaan perayu bukan penafian biasa tetapi penjelasan menunjukkan dadah itu mungkin milik Man Chai yang mungkin pengedar dan perayu hanya pembawa yang tidak bersalah (lihat perenggan 52 & 109).

(8) (oleh **Abdul Aziz Mohamad HMP**, menentang) Perbezaan ketara antara cerita saksi pendakwaan dan saksi pembelaan menyebabkan perayu berhujah bahawa terdapat dua kemasukan. Apa sekalipun sebab untuk perbezaan ketara antara keterangan saksi polis dan Tan berhubung kejadian yang membawa kepada kemasukan polis ke Bilik 1303, termasuklah perbezaan berhubung DSP Yap, fakta masih kekal bahawa apabila polis memasuki bilik itu apabila perayu berada di dalam, mereka mendapati ekshibit-ekshibit dalam keadaan yang digambarkan oleh saksi-saksi polis dan ini membuktikan bahawa perayu mengetahui bahawa ketiga-tiga silinder itu mengandungi dadah (lihat perenggan 33).

(9) (oleh **Abdul Aziz Mohamad HMP**, menentang) Hakim perbicaraan dalam kes ini tidak terpesong dengan maklumat yang diterima polis. Berdasarkan penghakiman jelas keputusan hakim perbicaraan untuk menolak pembelaan dibuat dengan pertimbangan objektif terhadap semua keterangan yang boleh diterima, yang daripadanya beliau mendapati bahawa perayu memiliki dadah itu. Oleh itu beliau telah menolak pembelaan yang melibatkan Man Chai kerana dengan penemuan bahawa perayu memiliki dadah itu tiada bezanya terhadap kebersalahannya jika dia menyimpan dadah itu untuk Man Chai yang akan datang kemudian ke hotel untuk mengambilnya (lihat perenggan 39). ]

**Notes**

For cases on admissibility of hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1578–1580.

For cases on failure of prosecution to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 135–141.

For cases on trafficking dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–139.

**Cases referred to**

*Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209, FC (folld)

*Chow Kok Keong v PP* [1998] 2 MLJ 337; [1998] 2 CLJ 469, FC (refd)

*Gooi Loo Seng v PP* [1993] 2 MLJ 137, FC (refd)

*Gunalan a/l Ramachandran & Ors v PP* [2006] 2 MLJ 197, FC (refd)

*Mat v PP* [1963] MLJ 263, HC (refd)

*Vijayaratnam v PP* [1962] MLJ 106, HC (refd)

**Legislation referred to**

Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a), 39B(2)
Evidence Act 1950 s 114(g)

**Appeal from**: Criminal Appeal No W-05–17 of 2002 (Court of Appeal, Putrajaya)

*Muhammad Shafee Abdullah (Frida Krishnan, Badrul Munir Bukhari and Teoh Ean Nee with him) (Shafee and Co) for the appellant.*
*Nurulhuda Nur'aini Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Abdul Aziz Mohamad FCJ (delivering dissenting judgment):**

**[1]** The appellant was convicted at the High Court of the offence of trafficking in 9,103.9g of the dangerous drug methamphetamine and was sentenced to death as required by s 39B(2) of the Dangerous Drugs Act 1952. The offence was alleged to have been committed in Room 1303 of the Hotel Nova, Jalan Alor, Bukit Bintang, at about 9.20pm on 19 June 2000. His appeal to the Court of Appeal was dismissed. He now appeals to this court.

**[2]** The appellant checked in at Hotel Nova around noon on 19 June 2000 and was assigned Room 1303. He had with him a suitcase, *Crocodile* brand, and a black sling bag. Not long after that he left the hotel, to return later in the afternoon with a suitcase, *Polo Santa Barbara* brand, which he had bought at the House of Leather at the Sungai Wang Plaza and which he took to his hotel room. Later he left the hotel again. According to Detective Lance Corporal Samsudin bin Jantan ('Samsudin'), who was keeping the appellant under surveillance, the time was 5.50pm

**[3]** The appellant arrived back at the hotel in a taxi. According to Samsudin the time was 7.20pm The appellant took three large plastic bags out of the taxi and went up the lift to his room with them. Each of the three plastic bags contained a stainless-steel cylinder wrapped in tin foil.

**[4]** After some minutes the appellant came down again by the lift and again left the hotel. Samsudin estimated the time it took for the appellant to go up the lift with the three plastic bags and come down again to be about five to ten minutes. According to the appellant the time that elapsed from the time he alighted from the taxi to the time he left his room again was five minutes.

**[5]** According to Samsudin, the appellant had with him, when he came down the lift, a white plastic bag which, before proceeding on his way, he deposited in a rubbish bin outside the hotel, at the entrance to a restaurant.

**[6]** About an hour and a half later, the appellant returned to the hotel and went up to his room. The time was about 8.50pm according to Samsudin and 9pm according to the appellant. It was after the appellant had returned to his room that ASP Giam Kar Hoon ('Giam') and his men, who, according to Giam, had been in readiness since about 8.30pm in the stairs area between the 12th and 13th floors, gained entry to the room. According to Giam, it was about 9.20pm, the time in the charge. The time tallies with the time 9.15pm stated by the assistant supervisor of the hotel, Mr Tang Chee Heong ('Tang'), a defence witness. The appellant did not mention the time.

**[7]** The room was searched and photos were taken of the things found, according to Giam in the order in which they were found. The appellant, who was placed under arrest, was in the room all the time until the police officers left it together with him and the articles seized, at about 1am according to Giam.

**[8]** Of the things that according to Giam were found in the room, I will mention only those that were incriminating. On the small bedside table was a small transparent *sarung plastik* containing what was subsequently established to be 6.1g of methamphetamine. Dato' Shafee, the appellant's counsel, in his written submission says that the *sarung plastik* was the plastic cover of a cigarette box. On the floor by the bed was a white plastic bag bearing the label SENG HUP. I will leave mention of its contents for later. On the floor of the shower room was the *Polo* bag that the appellant had bought earlier in the day. When opened it was found to contain the three plastic bags containing the three cylinders, each wrapped in tin foil, that the appellant had brought to his room at about 7.20pm The cylinders were brought out of the shower room for further examination near the bed. Two of the cylinders had each a lid which was glued to the cylinder. Inspector Ahmad Nizam ('Nizam'), who was in Giam's party, had to use force to pull out or prise up the lid but it took him only a few seconds to do it. Inside each of the two cylinders were four transparent plastic bags containing what was subsequently established to be methamphetamine. Each plastic bag was in turn wrapped in what Giam described as carbon paper like plastic. There were in each of the two cylinders pieces of sponge which, from the photos, appear to have served to line the inside of the cylinder. The other cylinder had no lid. It also contained four plastic bags like those in the other two cylinders, except that the topmost plastic bag was not wrapped in carbon paper and its mouth was not perfectly sealed in that there was a hole or opening in it. Giam did not say whether there were present pieces of sponge in this cylinder. There

were therefore twelve bags of methamphetamine in the three cylinders. The total weight of the drugs in the twelve bags was established to be 9,103.9g, the amount in the charge.

**[9]** The Seng Hup white plastic bag found on the floor by the bed contained an empty transparent plastic bag, a piece or sheet of carbon paper like plastic, two pieces of sponge, and a bolt (meaning metal pin of the kind used with a nut).

**[10]** As stated earlier, Samsudin said that upon leaving the hotel again after arriving with the three cylinders at about 7.20pm, the appellant deposited a white plastic bag in a rubbish bin. According to Samsudin, he retrieved the plastic bag from the bin shortly after and found that it was labelled TANG'S SALE OF THE YEAR and contained a metal lid, a piece of tin foil, two pieces of sponge, and two catalogue cards. These catalogue cards belonged to the appellant's *Polo* suitcase, one of them being, according to the appellant, a card of instructions on how to use the suitcase. Samsudin said that he handed these exhibits to Giam on 22 June, three days after their alleged recovery from the rubbish bin. On 3 July 2000 a photo ('P8') of these exhibits, namely, the Tang's plastic bag and its alleged contents, was taken in the room of Chief Inspector Mohd Nazri bin Mohd Ismail, the investigation officer for this case.

**[11]** Dato' Shafee accepts that the contents of the Seng Hup bag and some of the contents of the Tang's bag came from the cylinder that Giam said was found in the appellant's room without a lid.

**[12]** Putting aside for the moment the evidence of the appellant depositing the Tang's plastic bag in the rubbish bin, if the prosecution evidence as to the findings in the appellant's room is true, the inevitable conclusion would be that after the appellant brought the three stainless-steel cylinders in the plastic bags to his room, someone placed the three cylinders in the appellant's *Polo* suitcase and placed the suitcase in the shower room after or before interfering with the contents of the cylinder without the lid, by removing from it the sponge pieces, or some of them, and removing the carbon paper wrapping of the topmost of the four bags of methamphetamine in it for the purpose extracting from the bag a little of the drug and putting it in the small plastic cover that was found on the small bedside table. That someone put two of the pieces of sponge and the carbon paper wrapping into the *Seng Hup* bag that was found near the bed. That someone must have been the appellant or someone else. If it was someone else he could only have done all those things, if he could gain entry into the room, between about 7.30pm, when the appellant left his room after bringing the three cylinders to the room, and about 8.50pm, when he returned to the room. If it was the appellant, he must

have done all those things either during the five or ten minutes from the time that he arrived in the room with the three cylinders and the time he left it again or during the period from the time that he returned to the room again at about 8.50pm and the time 9.20pm that the police party gained entry to the room, or some during the first period and some during the second period. If there was no probability of anyone else having done those things, then it was the appellant who did them and he therefore had knowledge of the contents of the bags in the cylinders and was accordingly in possession of them. In that event it would be irrelevant to the question of the appellant's guilt whether or not anyone else was involved or had an interest in the drugs in the bags in the cylinders.

**[13]** But if, further, Samsudin's evidence of the appellant depositing the Tang's bag in the rubbish bin is true, then the inevitable conclusion would be that the cylinder found without a lid had a lid when it arrived in the appellant's room, that it was the appellant alone, and no one else, who removed the lid from the cylinder and did those other things that I have mentioned, and at least the removal of the lid and the removal of the pieces of sponge from the cylinder was done during the first period of five or ten minutes before the appellant left the room at about 7.30pm

**[14]** The appellant's story was that he came to Malaysia from Hong Kong on 12 June 2000 on an errand to collect money on behalf of his employer, one Michael Chan who ran a bar in Hong Kong, from various customers of Michael Chan's in Johor and Kuala Lumpur and that his guide in Malaysia to assist him in his errand was one Man Chai, a friend of Michael Chan's, in whose company he was on the trip to Johor on the first day and subsequently on many occasions in Kuala Lumpur and with whom he was constantly in communication by handphone. It is a fact that on 13 June 2000 the appellant checked in at Hotel Midah in Kuala Lumpur and stayed there until 19 June when he checked out of that hotel and moved into Hotel Nova. The appellant said that the change of hotels was on Man Chai's instructions.

**[15]** The appellant's story about the three cylinders was that he received a request from Man Chai on his handphone to get for him some machinery parts from someone, because he was not then free to do it himself, and keep them in his hotel room where he, Man Chai, would go later to collect them. The request was made when he was at a brothel during his trip in town after he had deposited the *Polo* bag in his room. A taxi arranged for by Man Chai picked him up at the brothel and, with directions given by Man Chai by handphone, took him to the place, where a male Chinese arrived and delivered to him the three plastic bags. Arrived back at his hotel room with the three plastic bags, he left them on the floor at the foot of the bed, directly went for a shower, and left the hotel again for dinner, to return at about 9pm

When he left the room this time, the *Polo* suitcase was where he had placed it near the wall between the small bedside table and the room dustbin.

**[16]** The appellant said that he bought the *Polo* suitcase in order to accommodate some souvenirs, including four or five ladies' handbags, that he had bought to take back to Hong Kong, because there was insufficient room in the *Crocodile* suitcase. Giam had said that he found no such souvenirs in the room. The appellant denied knowledge of how the three cylinders got into his *Polo* suitcase or how the suitcase got into the shower room. The appellant maintained that when the police found the three cylinders they all had lids and that it had required the strength of two officers to remove a lid. He denied having put a lid in the Tang's plastic bag and depositing the bag in the rubbish bin outside the hotel. He maintained that the two catalogues that were said to be in the Tang's plastic bag had always remained with the *Polo* bag, that is to say, that when the *Polo* bag was taken away by the police from the hotel room the catalogues were still with the bag. For the trial judge to accept as probable the appellant's claim that the three cylinders had lids when they were found in the room and that the two catalogues had always remained with the *Polo* bag, and his denial of depositing in the rubbish bin the Tang's plastic bag said to contain a lid and tin foil, the two catalogues and two pieces of sponge, the trial judge would have to accept as probable the shocking implication that after the event the police, who had taken away all the incriminating exhibits from the appellant's room, obtained a Tang's bag from somewhere, picked out from the collection of exhibits the things said to have been found in the Tang's bag, had a photograph of the Tang's bag and its alleged contents taken on 3 July 2000 and arranged for Samsudin to give false evidence about the appellant depositing the Tang's bag in the rubbish bin outside the hotel and about its contents.

**[17]** As for the small plastic cover containing the drug, said to have been found on the small bedside table, the appellant said that it was not there when he came into the room at about 9pm. This implied a suggestion on the appellant's part that it was placed there by the police after they had entered the room and extracted some drug from the transparent plastic bag said to have been found with a hole in its mouth and transferred it to the small plastic cover.

**[18]** As for the Seng Hup plastic bag, the appellant admitted that the police found it as in photographs P30E and F, that is, on the floor near the bed, but maintained that it was not his. He, however, did not state whether it was there when he entered the room at about 9pm.

**[19]** There was, in the appellant's evidence that when the police did something (*berbuat sesuatu*) in his room he did not see it because he was by

A the wall surrounded by police officers, a suggestion that it was the police who had arranged the exhibits in the room in the manner in which they were said to have been found, and that it was done on that occasion, when the appellant was present in the room. The appellant maintained that he only knew that the three cylinders contained methamphetamine after the police
B had opened them and showed him their contents.

**[20]** After the close of the defence case, the appellant's then counsel submitted, inter alia, that the case against the appellant had been fixed by the prosecution witnesses and the evidence against the appellant was a plant on
C someone's part. Bound up with that submission was the question of the involvement in this case of DSP Yap Seng Hock, who had no part in the trial.

**[21]** The learned trial judge found that the explanation of the appellant in
D his defence did not raise any reasonable doubt as to the truth of the case for the prosecution. He rejected the submission of the appellant's then counsel that the appellant was the victim of a conspiracy as being unsupported by evidence capable of raising a reasonable doubt on the prosecution case. He found on the evidence that the appellant had handled the drugs in the
E cylinder found without the lid and therefore knew of the existence of the contents of the three cylinders and of their nature. The appellant was therefore in possession of the drugs and, in view of the amount, by virtue of s 37(da) of the Act the presumption of trafficking arose, which the learned trial judge found the appellant had failed to rebut.

F

**[22]** In this appeal the thrust of the submission of Dato' Shafee, who was not the counsel for the appellant in the High Court and the Court of Appeal, is a contention that was not specifically made in either of those courts but which Dato' Shafee maintains is warranted by the evidence. The contention
G is that before the entry into the appellant's room that Giam related in his evidence, when the appellant was present in the room, the police had made an earlier entry into the room when the appellant was absent, namely, between about 7.30pm and 8.50pm or 9pm. The evidence that Dato' Shafee relies on primarily for that contention is the evidence of Tang, the assistant
H supervisor of Hotel Nova who has been mentioned before and a defence witness, about events leading to the entry into the appellant's room, when compared with the evidence of Giam. Other evidence about other aspects of the case is also relied on as lending credibility to that contention, and this includes evidence as to DSP Yap's involvement in this case. This other
I evidence has all been drawn to the court's attention during the trial in support of the submission that there was a reasonable doubt as to who positioned the incriminating exhibits in the manner in which they were said to have been found in the appellant's room. As to DSP Yap, it is a fact that he engaged Room 1310 at 6.30pm that evening. Giam, while admitting in

cross-examination that DSP Yap was the operations co-ordinator, said that he did not know that Room 1310 was occupied by any police officer or where DSP Yap was that evening. Lance Corporal Abdul Halim bin Basri, a member of the raiding party, said in cross-examination that DSP Yap was not at the hotel that evening. It was contended by the defence in the High Court that the police witnesses were deliberately withholding knowledge of the involvement of DSP Yap, and that this raised a serious question which, with other aspects of the case, created a reasonable doubt as I stated just now. All that would have been considered by the learned trial judge, who nevertheless found that the defence failed to raise a reasonable doubt on the case for the prosecution. To my understanding, Dato' Shafee is not in this appeal relying on those aspects of the case by their own strength for success of the appeal but merely as corroborative of the thrust of the appeal, namely, the new contention that there had been an earlier entry by the police into the appellant's room when he was absent. I shall now proceed to set out the evidence that has given rise to the new contention.

**[23]** The following is a summary of Giam's evidence. The police were acting on information received about the appellant. They had been provided with a photograph by which to identify him. At about 12.10pm on 19 June 2000, Giam received information that the appellant was staying at Hotel Nova. Samsudin and Detective Corporal Teo were sent ahead to the hotel to keep surveillance on the appellant. Samsudin was in touch with Giam by walkie-talkie. At about 5.30pm, Samsudin reported that the appellant had left the hotel. At about 6.30pm the raiding team, comprising Giam and four other officers, gathered at the Stadium Negara. At about 7.20pm Samsudin reported that the appellant had arrived back at the hotel in a taxi, bringing with him the three plastic bags. The team of five left Stadium Negara at about 8pm and at about 8.30pm gathered in the stairs area between the twelfth and thirteenth floors of the hotel. At that time they had already received information from Samsudin that the appellant had left the hotel again. Giam and Nizam went up to Room 1303 and found the door locked.

**[24]** At about 8.50pm Samsudin reported that the appellant had returned to the hotel. After estimating that the appellant had entered his room, the team slowly approached the room. Finding that the door was locked, Giam asked Nizam to go and get a master key from the management. After several minutes he came back with Tang the Assistant Supervisor, who produced a master key and showed Giam how to use it. It was in the form of a card. Giam tried twice to unlock the door using the master-key card but was unsuccessful because the door was bolted on the inside. Giam returned the key card to Tang. After Tang left, Giam knocked on the door. That, Giam said, was at about 9.15pm The appellant asked in Cantonese from inside the room, 'Who's that?' Giam answered in Cantonese, 'Police'. The appellant

said, 'Wait'. After a minute, Giam knocked hard on the door, asking it to be opened, but it was not opened. So Giam asked Lance Corporal Abdul Halim to break open the door using an implement for the purpose, but after several attempts the door could not be broken open. Within about three minutes later Giam heard the door being unlatched on the inside and the door was opened and the police party rushed in. That, going by Giam's evidence, would have been about 9.20pm, the time in the charge.

**[25]** It is to be observed that, according to Giam, when he started knocking on the door at about 9.15pm, Tang had already gone away. Therefore Tang was not present to witness the knocking and what happened subsequently. I should mention that according to the front office manager, Encik Cemal Mohamed, another defence witness, the lock unit of the door, which would record every insertion of the key card, was subsequently found damaged, so that it was not possible to tell how many times the room was entered on 19 June 2000. This has evoked a suggestion in this appeal that the police deliberately damaged the lock unit to destroy evidence of their earlier entry.

**[26]** The following is the evidence of the defence witness Tang. At about 8.40pm two police officers came to the counter to ask for the key to Room 1303. He went to the room with the officers and saw about eight police officers waiting to enter the room. After being told that someone in Room 1310 wanted to see him, he went to that room, where the person introduced himself as DSP Yap and said that he wanted Tang to open the door of Room 1303 because the officers wanted to raid it. So Tang complied and opened the door himself by using a second key because the first key was found to have a problem. The team of officers, including DSP Yap, entered the room and Tang was asked to go away, which he did. That was at 9.15pm. Going by Tang's evidence, there was no problem about getting the door opened. In cross-examination he maintained, obviously in reference to the time before he went away, that there was no knocking on the door by the police, no exchange of words across the door between Giam and someone in the room, and there was no attempt to break open the door. The cross-examination on those matters was gratuitous since the prosecution's case, by Giam's evidence, was that those matters occurred after Tang had gone away.

**[27]** I should mention the appellant's evidence on this aspect of the case. He returned to his room at about 9pm. He undressed himself because it was warm. After undressing he heard a knock on the door. He asked, 'Who is it?', received the answer, 'Police', and asked them to wait awhile for him to get dressed again. Then he opened the door and the police officers entered the room. Besides Giam, there was another officer who spoke in Cantonese and who had not been present in court. The inference that the defence expected to be made was that this other officer was DSP Yap.

**[28]** The appellant's evidence on this aspect of the case would be consistent with Giam's evidence were it not that Giam's evidence had the additional element of the attempt to break open the door and did not admit the participation of DSP Yap.

**[29]** In view of the differences between Giam's evidence and that of Tang about the manner in which the police officers were enabled to enter Room 1303, those witnesses would appear to be talking about two separate occasions. The differences amount to this. According to Tang, the entry was plain sailing, effected simply by the use by him of a master key, while according to Giam there was much ado in gaining entry and entry was gained only when the appellant himself opened the door. They are two versions that conflict directly and sharply. Dato' Shafee submitted therefore that Tang's evidence was about an earlier occasion, when the door was without any difficulty opened by him by using a master key when the appellant had not yet returned to the room and was not inside it, because if he was the door would have been locked from inside and would not have been capable of being opened except, according to Cemal the front officer manager, with an emergency key. Dato' Shafee submitted that Tang was not involved on the occasion related by Giam, which was a later occasion when the appellant had returned to his room.

**[30]** The question is therefore whether it would be reasonable to conclude that Tang's evidence at least raises the probability that the entry that he related was an entry made before the entry related by Giam and the appellant. Although Tang was a defence witness, it was submitted that he had no interest to discredit the police or to favour the appellant, and therefore may be regarded as an indifferent or independent witness. The learned trial judge did not give a reasoned assessment of the creditworthiness of Tang. From his grounds of judgment, it would appear that Tang's evidence was used in submission to prove the participation of DSP Yap in the raid, and the only remark that the learned trial judge made about Tang was that he found it difficult to accept Tang's evidence about DSP Yap's participation in the raid, and that was only because the prosecution evidence was clear that he did not take part in the raid. The learned trial judge simply preferred to accept Giam's evidence over Tang's evidence.

**[31]** In point of time, no probability can be entertained that the police entered Room 1303 on two different occasions, because the time given by Giam and Tang for the entry was the same, namely, 9.20 or 9.15pm. To overcome that otherwise insurmountable difficulty, Dato' Shafee suggested that Tang could have been mistaken about time, considering that the memory of an event remains firm in a person's mind long after the event, but not the

memory of the time, and that when Tang was approached to give evidence for the defence it might have been a long time after the event.

**[32]** I have to bear in mind that when Tang's evidence was led for the defence it would have been on the basis that his evidence, including that as to time, was true and correct. Whatever the purpose for the defence may have been in eliciting Tang's evidence — and one purpose would appear to have been to prove DSP Yap's involvement in the same raid that Giam had testified about — Tang's evidence was, to the defence, good for the purpose. The evidence as to time was elicited for the purpose and was not merely incidental. I have also to bear in mind that the defence in the trial did not proceed on the basis that there was an earlier entry by the police and Tang's evidence was not adduced for the purpose of proving an earlier entry. In other words, the question of an earlier entry by the police was not tried and the learned trial judge was not called upon to consider the question. The question only arose in this appeal because Dato' Shafee, who did not represent the appellant in the High Court and in the Court of Appeal, noticed sharp differences between the narratives of Giam and Tang. Therefore if the question is to be entertained in this appeal it has to be entertained only on the evidence as it stands, and that is Tang's evidence. It would, therefore, in my judgment, be wrong in principle on my part to entertain the question on the basis that Tang's evidence is correct in point of happening but to allow that it is incorrect in point of time in order to accommodate the notion of an earlier entry. The question of time was never in question during the trial. Tang's evidence continuously covered the period from 8.40pm, when he was asked for the master key, until 9.15pm, when the door was opened and the police entered the room. The prosecution accepted the correctness of those times as being consistent with Giam's evidence and had no reason to cross-examine, and did not cross-examine, Tang as to the correctness of those times. What was in dispute was only the character of the event, as to which it was put to the witness by the prosecution, albeit gratuitously as I said, questions or suggestions about the police knocking on the door, attempting to break open the door, the exchange of words between the appellant and Giam through the closed door, and the actual number of police officers. To accept in this appeal the probability that Tang was mistaken about those times would be to act contrary to evidence that was not in question during the trial.

**[33]** For that reason I am unable to accede to the suggestion of an earlier entry by the police. There was only one entry, at 9.20 or 9.15pm. It follows that in this appeal there is no basis for entertaining the probability that the disposition of the exhibits in the room as established by Giam's evidence was the result of police action when the appellant was absent from the room. Whatever may have been the reason for the sharp differences between the

narratives of Giam and Tang as to the events culminating in the entry of the police into the room, including the difference as regards the involvement of DSP Yap, which differences tend to create an illusion of an earlier entry, the fact remains that Giam and his officers entered the room when the appellant was in and found the exhibits in the state in which Giam testified they were, which proved that the appellant knew that the three cylinders contained the drugs.

**[34]** I will now consider another point which Dato' Shafee raised with, I believe, the unexpressed intention of saying that on the point alone the appeal should be allowed. It arises from what the learned judge said towards the end of his grounds of judgment after saying that he made a finding, upon considering the defence evidence, that the appellant had handled the drugs in the lidless cylinder and that therefore he was aware of the existence of drugs in the three cylinders and knew of their nature. He went on to say, and I render it into English, the grounds being in Malay:

> His defence was that he was merely assisting Man Chai by collecting the three plastic bags which, according to Man Chai, contained mechanical equipment. He had kept the three plastic bags in his room. Man Chai had told him he would come to the hotel that night to collect the plastic bags. I was unable to accept the accused's explanation that is now being discussed. His explanation did not raise in my mind a reasonable doubt as to his guilt. The evidence showed that the accused was a police target in this operation since the beginning. The police had received information that a male Chinese from Hong Kong would be trafficking in the drug 'syabu' that day and had received a copy of the accused's portrait. SP4 (Samsudin) was able to recognise the accused from the portrait. The prosecution case did not suggest or portray Man Chai as the target in this operation.

**[35]** Dato' Shafee's point concerns the disclosure in evidence of the information that the police received about the appellant and relies on the decision of this court in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209.

**[36]** In that case, this court quashed a conviction of trafficking in cannabis. After dealing with one ground on which alone the conviction had to be quashed (p 216D) and stating that there were three further grounds for allowing the appeal (p 217H–I) and then dealing with those three other grounds (pp 217I, 219I, 220F), this court went on to consider another matter. This was the disclosure in evidence of the fact that the operation in that case was on information received that a certain Indian man would be trafficking in and transporting drugs in a certain motorcar, which would be travelling in a certain direction.

A [37] In relation to that disclosure, Edgar Joseph Jr FCJ, speaking for this court, said at p 221:

> ... we consider that in appropriate circumstances, there is nothing objectionable in a law enforcement officer saying, by way of introduction that, 'acting on information received', he took certain steps in the investigation. However, when such testimony is given, care must be taken not to divulge the contents of the information, as happened in the present case, since this may well be open to the objection that it is hearsay and, in all probability, prejudicial to the accused ...

B

C He went on to say that although the learned trial judge had not referred to the information disclosed, 'the possibility that he was swayed by it could not be ruled out ... and its effect might well have been to prejudice the case for the appellant'.

D [38] Although the disclosure of the information was not expressly stated to be yet another ground for allowing the appeal — and it was not one of the three further grounds — it may appear to be so.

E [39] In this case I have no doubt that the learned trial judge was not swayed by the information that the police received. From the judgment it is clear to me that his rejection of the defence was made upon an objective consideration of all the admissible evidence, from which he found that the appellant was in possession of the drugs. From what he said in the passage quoted it seems clear to me that he rejected the defence, which involved Man Chai, because, with the finding that the appellant was in possession of the drugs, it made no difference to his guilt if he was keeping the drugs for Man Chai who was said to be coming to the hotel to collect it. The learned judge's mention of the information received by the police and of the appellant being the target of the police and not Man Chai was as much as to say merely that the focus of the police operation and of the case was the appellant, whose guilt had to be established, and was established by proof of possession, and not Man Chai, whatever his concern with the drugs may have been.

F

G

[40] The point therefore does not, in my judgment, avail the appellant.

H

[41] For the reasons that I have given, I would confirm the decision of the Court of Appeal affirming the conviction and sentence, and dismiss this appeal.

I **Hashim Yusoff FCJ (delivering majority judgment):**

[42] I had the benefit of reading the draft judgments of my learned brothers, Abdul Aziz Mohamad and Zulkefli Ahmad Makinudin FCJJ and

having weighed the prosecution evidence as against the defence, I am inclined to agree with the decision of my learned brother Zulkefli Ahmad Makinudin FCJ for the following reasons.

**[43]** The facts of the case have been sufficiently narrated in the judgments of my learned brothers, so I won't repeat them anymore.

**[44]** At the end of the prosecution's case, the evidence before the trial High Court judge was that when the police party raided the appellant's room at Hotel Nova, the incriminating exhibits, containing a total of 9,103.9g of methamphetamine were found in his room together with the appellant. There was no other person in the room except the appellant when the police party entered the room. The said room No 1303 was registered in the name of the appellant. That being so, the learned trial judge had called for the defence of the appellant pursuant to s 37(da) of the Dangerous Drugs Act 1952.

**[45]** However in his defence, the appellant did not merely deny the allegation, but afforded an explanation which if accepted would raise a reasonable doubt in the prosecution's case. It is trite law that even if the court does not believe the accused's explanation but nevertheless it raises a reasonable doubt as to his guilt then he should be acquitted (see *Mat v Public Prosecutor* [1963] MLJ 263).

**[46]** In his defence the appellant had given evidence on oath stating that he was sent by his employer, one Michael Chan, in Hong Kong to collect money from his client in Kuala Lumpur. On arrival at the Kuala Lumpur International Airport, he was met by one 'Man Chai' supposedly to be one of Michael Chan's friends. The appellant then checked first into Midah Hotel and subsequently on Man Chai's instructions, into another hotel on 19 June 2000 ie the Nova Hotel. Apart from denying that the drugs found in his Nova Hotel Room 1303, were his, the appellant said that the plastic bags and their incriminating exhibits belonged to 'Man Chai' who was supposed to have come to collect them from the said room.

**[47]** Even at the time of his arrest in the Nova Hotel room, the appellant had already mentioned 'Man Chai's' name to the raiding officer, ASP Giam Kar Hoon (PW7) and had begged PW7 not to switch off the appellant's handphone because 'Man Chai' would be calling the appellant to collect the plastic bags. But PW7 ignored his plea and switched off the appellant's handphone. the appellant reiterated the same story in his cautioned statement to the police subsequently (see exh D 29). Why did PW7 not wait to see if

A 'Man Chai' would indeed have made the call to the appellant's handphone? There is no other evidence adduced by the prosecution to negate the possibility of Man Chai's existence.

B **[48]** PW7's switching off the appellant's handphone therefore denied the appellant's explanation to show that 'Man Chai' did in fact exist if he were to receive the call. There was no evidence given by the prosecution as to whether there were calls made to the appellant's handphone around that material time. This gives rise to a reasonable doubt as to the possibility of the existence of the so called 'Man Chai'. In fact this piece of evidence was corroborated by
C a travel agent ('DW9') who said he knew and had met Man Chai who he believed was now operating a video shop in Ringlet, Cameron Highland. However, PW3 in his evidence admitted that he did not investigate regarding 'Man Chai'. In *Alcontara Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 this court at p 219E–H said:

D

> To resume our discussion regarding the important point of misdirection as regard the burden of proof, especially the burden on the defence we must point out, with respect, that it was wrong for the judge to have criticised the defence for having failed to put to the investigating officer, the name of Che Mat, or the latter's
E telephone number, or his place of abode, for the simple reason that these particulars had been disclosed in the caution statement of the appellant made the day after the arrest so that the police had all the time in the world to check their verocity. That being the case, the onus was on the prosecution to check on whether the accused's version of the facts, as they appeared in his caution statement and to which we have referred, was true or false. In other words, the onus was upon the
F prosecution to disprove this important part of the accused's version of facts. The defence was, therefore, under no duty to put the matters aforesaid to the investigating officer, having regard to their prior disclosure in the cautioned statement. In holding to the contrary had undoubtedly overlooked the material portions of the caution statement touching on Che Mat, reversed the onus, and
G placed it on the defence, so that on this further ground also, the conviction had to be quashed.

**[49]** Then there is the evidence of the Nova Hotel staff, one Tang Chee Heong ('DW2') who testified that DSP Yap Seng Hock had also booked
H room No 1310, at about 6.30pm on 19 June 2000. Later at about 8.40pm the same day, two other police officers had requested DW2 to open Room 1303, which was registered under the appellant's name. So DW2 took the police officers to Room 1303 and opened the door to the said room in the presence of DSP Yap Seng Hock and a group of about eight police officers.
I After that DW2 was asked to leave the place. This piece of evidence is relied upon heavily by Dato' Shafee, learned counsel for the appellant, to suggest that there was an earlier entry by the police into the appellant's room when he was not there. That in turn would give rise to a reasonable doubt as to whether the time when the appellant's room was opened after the appellant

had returned and after some knocking on the room door by the police and that it was subsequently opened after the appellant had unlatched the door from inside was the only time the raiding party had gone to Room 1303 or whether there was an earlier entry into the room by the police when it was opened by DW2 using the master key card.

**[50]** It must be borne in mind that DW2 is a staff of Nova Hotel. There is no evidence to suggest that he might in anyway be giving evidence to help the appellant or to discredit the police. He simply gave evidence as to what actually transpired. It would therefore be difficult to brush aside his testimony that it was him who opened the door to Room 1303 using his copy of the key card when requested by the police on 19 June 2000 at about 8.40pm. It was also in evidence that the appellant had left his room at about 7.30pm and only returned at about 8.50pm.

**[51]** In cases where access to the room which was occupied by a person had been made available to others as well, it would not be safe to find that person to be in exclusive possession of the drugs found in the said room. In the case of *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 this court held, inter alia:

> (3) Even if the appellant had knowledge of the presence of the heroin in the room, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others had access to the room and could have concealed the heroin there.

**[52]** Although in an appeal, findings of facts by the trial court are seldom disturbed, I find on the evidence in this appeal, a reasonable doubt has been raised by the defence which necessitates an interference. With respect, the trial judge did not view the whole of the evidence objectively and from all angles with the result that the appellant had lost the chance which was fairly open to him of being acquitted.

**[53]** As such I would allow this appeal and set aside the conviction and sentence of the appellant and acquit and discharge him.

**Zulkefli FCJ (delivering majority judgment):**

INTRODUCTION

**[54]** The appellant, a Hong Kong national was charged in the High Court of Kuala Lumpur on a charge of trafficking, 9,103.9g of methaphethamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. The learned judge of the High Court

found the appellant guilty, convicted and sentenced him to death. The appellant appealed to the Court of Appeal against the decision of the High Court. The learned judges of the Court of Appeal dismissed the appellant's appeal against conviction and sentence, and upheld the death sentence imposed by the High Court. Being dissatisfied with the decision, the appellant now appeals to this Court against the whole decision of the Court of Appeal.

THE CASE FOR THE PROSECUTION

**[55]** The evidence adduced by the prosecution may be briefly summarised as follows.

**[56]** On the morning of 19 June 2000 ASP Giam Kar Hoon ('PW7') from the Narcotics Division of Bukit Aman received information that a Chinese male from Hong Kong by the name of Chan King Yu would be trafficking in a dangerous drug at a hotel in Kuala Lumpur on that very day. Acting on that information PW7 assembled a team of police personnel. Among the members of the team were Shamsuddin Jantan ('PW4') and Lance Corporal Abdul Halim Basri ('PW5'). At about noon on the same day, PW7 received further information that the hotel at which the offence was to be committed was the Hotel Nova at Bukit Bintang. He at once dispatched PW4 and one Detective Corporal Teoh to the hotel to conduct a surveillance of the appellant. On arrival at the scene, PW4 remained in his car which he parked close to the entrance of the hotel. At about 12.25pm he saw the appellant emerging from the hotel. The appellant was alone. He carried a sling bag. PW4 recognised the appellant from a photograph given to him by PW7. The appellant walked into Bukit Bintang Plaza, a well known shopping complex in Kuala Lumpur. When the accused emerged from the Plaza, he was seen carrying a new suitcase ('exh P12') which bore the brand name 'Polo'. The appellant then returned to the hotel. He went into Room 1303 on the 13th floor. Then, at about 5.50pm, the appellant once again emerged from the hotel. He was alone. He walked onto the street and disappeared in the crowd. He returned to the hotel at about 7.20pm. He came in a taxi. After he had descended from the taxicab, the appellant removed three plastic bags from the trunk of the vehicle. Having paid off the taxi the appellant re-entered the hotel. He carried the plastic bags with him. He took the lift to the 13th floor. The appellant re-emerged about five or ten minutes later. He carried a plastic bag ('exh P24') which he placed in a dustbin near the hotel. He then walked away. Exhibit P24 was recovered almost at once by PW4. It bore the words 'TANG'S SALE OF THE YEAR'. Inside it was a metal lid, tin foil, a card bearing the words 'SANTA BARBARA POLO & RACQUET CLUB' and

another card with the word 'TONGWU' printed on it. At about 8.30pm a police ambush party arrived at the hotel and took their positions on the staircase landing on the 13th floor.

**[57]** The appellant returned to the hotel at about 8.50pm and went into Room 1303. A little later, PW7 and the ambush party who were already on the 13th floor were alerted of the appellant's arrival. They waited for him. PW7 and his team tried to gain entry into the room. They failed even with the assistance of the hotel's staff. The ambush party then tried to break open the lock to the room door. A few minutes later the appellant opened the door. PW7 introduced himself as a police officer to the appellant. The room and bathroom were searched. Several items were recovered. On a table beside the bed was small packet of transparent plastic containing what proved on subsequent chemical examination to be methamphetamine. Also seized was exh P12. Inside P12 were three plastic bags. Each of these plastic bags contained a cylinder wrapped in tin foil. Each cylinder had within it four small parcels wrapped in carbon paper and sponges. All the parcels that were recovered contained a white crystalline substance which on subsequent chemical analysis showed to be methamphetamine, a prescribed drug under the Act.

**[58]** Based on the foregoing facts the learned judge of the High Court ruled that a prima facie case of actual possession had been established under s 37(da) of the Act. He then called upon the appellant to make his defence.

THE CASE FOR THE DEFENCE

**[59]** The appellant ('DW1') testified on oath and the relevant parts of his evidence and defence are as follows.

**[60]** The appellant had been sent by his employer in Hong Kong, one Michael Chan to collect money from the latter's client. On the appellant's arrival at the airport at Kuala Lumpur he was met by one Man Chai, one of Michael Chan's clients. The appellant first checked in at Hotel Midah and later checked out into Hotel Nova on 19 June 2000 as instructed by Man Chai. He was told by Man Chai to collect some tools which the appellant did. He denied placing the plastic bags inside the POLO suitcase. He claimed that the policemen had done that. He denied any knowledge of the drugs in the cylinders. He denied that the small packet of drugs found on the bedside table was his. He also denied that he threw exh P24 into the dustbin outside the hotel. He said that the plastic bags and their contents belonged to Man Chai who was supposed to come to the hotel and collect it. The appellant in his cautioned statement ('exh D29') had mentioned the name of Man Chai and had given the telephone number of Man Chai to the investigating officer

('PW3'). The appellant in his evidence also stated that when he was arrested he begged ASP Giam Kar Hoon ('PW7') not to switch off his handphone as Man Chai would be calling him to collect the plastic bags but PW7 switched off his handphone.

**[61]** The appellant also called nine other witnesses in presenting the case for the defence. In my view the evidence of the following witnesses are relevant for the consideration of the defence case:

*Tan Chee Keong (DW2)*

**[62]** DW2 in his evidence, inter alia, stated that on 19 June 2000 he was working at Hotel Nova. While on duty that day a police party came to Hotel Nova. One policeman whom DW2 referred to as Yap Seng Hock (DSP Yap Seng Hock) came in at 6.30pm to book a room No 1310 at the said hotel. DW2 gave Yap Seng Hock the room and keyed-in the particulars into the computer. Yap Seng Hock was alone when he checked in. At about 8.40pm two other police officers came to the hotel counter asking DW2 the key to Room 1303 of the said hotel stating that they wanted to open the door to Room 1303. DW2 then made available a key and followed the two police officers to the 13th floor of the hotel. When DW2 arrived at the 13th floor he saw about 8 police officers about to ambush the Room 1303. DW2 was also told by one of the police officers that a police officer in Room 1310 wanted to see him. Once DW2 entered Room 1310 the police officer introduced himself as DSP Yap Seng Hock and DW2 was informed that the police officers wanted to ambush Room 1303. DW2 was asked to open the door to Room 1303. When DW2 opened the door to Room 1303 DSP Yap Seng Hock was together with members of the police raiding team. DW2 was then asked to go away and he so left the place.

*Cemal Mohamed Abdus Samad (DW3)*

**[63]** DW3 on 19 June 2000 was the Hotel Nova's front office manager in charge of operations. At about 11.52pm on 19 June 2000 he received a call from one, William Tan Chee Kiong, the Hotel Nova supervisor that a raid had taken place at Room 1303 and that a suspect had been apprehended. He was also told that DSP Yap Seng Hock wished to speak to him. DSP Yap Seng Hock informed DW3 that he had occupied Room 1310 just for a few hours and this was to enable him to carry out the police raid in the hotel, and he requested that the room charges be waived. DW3 agreed to do so. DW3 in his evidence stated that the key to the room door 1303 is by using a key-card and the occupant will hold one key-card. The front office supervisor, the house keeping maid and the floorman will each carry one key-card. DW3 also said he will carry one key-card but the security guard does not carry one. Each

time the key-card is inserted to the room door it will be recorded. When DW3 was asked as to the record of how many times entry were made into the said Room 1303 on 19 June 2000, DW3 answered that he would not be able to do so. This was because the lock to the door Room 1303 was damaged and he was informed that it was damaged by the police. On this damaged door to Room 1303 DW3 spoke to DSP Yap Seng Hock wherein DW3 was told to write in to his office for compensation.

*Lo Vai Mei (DW4)*

**[64]** DW4 is the girl friend of the appellant and was then residing in Hong Kong. In her evidence DW4, inter alia, stated that she had known the appellant since September 1995. She knew that the appellant left Hong Kong on 12 June 2000 and that the appellant was asked by his employer by the name of Michael Chan to come to Malaysia to look for his friend and to collect some moneys. DW4 said that she bought the ticket for the appellant's trip to Malaysia by using her credit card. DW4 also said that she knew Michael Chan, the employer of the appellant since July 1998. DW4 described Michael Chan as a person of about 50 years of age, five feet seven inches tall and of medium size. DW4 further stated that she knew Michael Chan's wife and Michael Chan has two daughters. DW4 in her evidence stated that on 18 June 2000 at about 10.30pm she did call the appellant wherein she had asked the appellant to buy for her a handbag, shoes and souvenirs. The appellant informed DW4 that his bag was small and those items to be bought could not be placed inside his bag. For that reason DW4 requested the appellant to buy a new bag. DW4 spoke to the appellant for about seven minutes on this occasion using the telephone number 601–6361–2782. On 19 June 2000 at about 8.30pm DW4 stated that she again called the appellant. The appellant informed DW4 that he was then having dinner and that he would call DW4 later that night. The appellant called on her at about 8.45pm and they spoke for about ten minutes. Some time later that same night Michael Chan called on DW4 informing her that the appellant had been arrested. On that same night DW4 went to see Michael Chan at his house to find out what had actually happened to the appellant. When DW4 was at Michael Chan's house, Michael Chan made a call to Man Chai seeking the help of Man Chai to save the appellant as the appellant was innocent and did not know anything.

*Richard Herboldr (DW9)*

**[65]** DW9, a freelance travel agent in his evidence stated that he knew and have met a person by the name of Man Chai. Man Chai has a brother whom DW9 called as Bota Chai. DW9 used to spend the time together with Man Chai and his brother as friends around the areas at Bukit Bintang, Jalan Alur,

Sungai Wang Plaza and Imbi Road in Kuala Lumpur. DW9 believed that Man Chai is now residing in Cameron Highlands operating a video shop in Ringlet.

FINDINGS OF THE HIGH COURT

**[66]** At the conclusion of the trial the learned judge of the High Court held that the appellant in his defence had failed to raise a reasonable doubt as to the truth of the prosecution's case. He accordingly convicted the appellant.

**[67]** The learned trial judge found that the appellant had possession, custody and/or control of the drugs found in the room and made a finding that the prosecution had proved possession of the drugs with the appellant by direct evidence. The learned trial judge in his judgment also stated that the evidence showed that the appellant was a police target in their operation from the very beginning. The police had received information that a male Chinese from Hong Kong would be trafficking in drugs on that day, 19 June 2000 and they were also given a photograph of the appellant. As regards the person by the name of Man Chai, the learned judge stated that from the prosecution's case, it did not suggest or show that Man Chai was the target of the police operation. The learned judge rejected the defence of the appellant that he was keeping the three plastic bags containing the metal cylinders for Man Chai to collect from him at the hotel. The learned judge found that the explanation given by the appellant that he was directed by his employer, Michael Chan to collect debts from Michael Chan's friends did not at all create any doubt in his mind in view of the fact that there was no corroborative evidence. In the result the learned judge held that the defence failed to rebut the statutory presumption that the appellant was trafficking in the said drugs as provided for under s 37(da) of the Act which had arisen against him. The appellant was found keeping the drugs in his room in the hotel wherein the learned judge stated that the appellant was alone when the police party raided that room.

FINDINGS OF THE COURT OF APPEAL

**[68]** The Court of Appeal, inter alia, held that the trial judge was quite correct in accepting PW4 as a truthful witness and in acting upon his evidence. The appellant's overt act of disposing of exh P24 shows that he was exercising dominion over the contents of that bag, all of which came from his room. There is the plastic packet on the bedside table containing the proscribed drug in question and there is the act of the appellant purchasing the large Polo suitcase when he already had one in his room. There is the unexplained delay by the appellant to open the door to his room taken together with inability of the police to get the door open even with the

assistance of the hotel staff. The appellant gave no explanation for his conduct in this respect, especially the long delay on his part. Each of these circumstances when taken alone may be insufficient to prove mens rea possession but taking into account the combined strength of the individual strands of evidence in this case, there can be no doubt whatsoever that the appellant was aware of his possession of the drug, that he knew the nature of drug he possessed and that he had the power of disposal over it. The overt acts of the appellant certainly established these matters. In short, the appellant had mens rea possession. The learned judge was therefore entirely correct in invoking and applying the presumption under s 37(da) of the Act and in holding that the appellant had committed the offence of trafficking.

THE APPEAL

**[69]** At the outset of the hearing before us, learned counsel for the appellant submitted that essentially the learned trial judge and the learned judges of the Court of Appeal had failed to consider and evaluate the entire evidence and the glaring material discrepancies and weaknesses in the prosecution's case in convicting the appellant. It was also submitted that there were overwhelming evidence that the appellant in his defence had raised a reasonable doubt as to the truth of the prosecution's case. The appellant advanced a number of grounds of appeal. However, I shall deal only with the main grounds of appeal which were focused on the following issues:

(1) *The police were acting on information received*

**[70]** It was argued for the appellant that the learned trial judge and the Court of Appeal judges had misdirected themselves in admitting hearsay evidence and other inadmissible evidence which was highly prejudicial to the appellant. It was submitted that in respect of some of the admitted evidence there were elements of higher prejudice than probative value and the court ought to have exercised its discretion to exclude them. It was contended for the appellant that the prejudicial element is that the police were acting on information received by ASP Giam Kar Hoon (PW7) from an informant that on 19 June 2000 a Chinese male from Hong Kong by the name of Chan King Yu would be trafficking in a dangerous drug ('syabu') at Hotel Nova, Kuala Lumpur. Based on this information PW7 assembled his team to raid the said hotel room occupied by the appellant.

**[71]** It can be gathered from the evidence adduced by the prosecution witnesses that the police team were in fact acting on information received to effect the arrest and detention of the appellant. PW7 in his evidence, inter alia, had stated as follows:

(i) Sebelum tugas serbuan, pagi hari tersebut saya telah menerima maklumat dari sumber. Maklumat darinya mengatakan satu rakyat lelaki Cina Hong Kong bernama Chan King Yu akan mengedar dadah syabu di sebuah Hotel di Kuala Lumpur ... Dalam lebih kurang 12.10 tengahari sumber telah menalipon saya dan telah beri nama hotel tersebut, iaitu Hotel Nova.

(See p 193 of the Appeal Record Vol 2).

(ii) Selain dari menyerbu di premis disyaki bilik hotel saya telah beri description sasaran kami, iaitu lelaki Cina bernama Chan King Yu, serta dengan gambarnya. Saya boleh tunjuk gambar sasaran ... This is the original copy yang diberi oleh sumber saya ... Saya beri salinan photocopy kepada anggota saya. Saya terima gambar ini pada hari kejadian jam lebih kurang pukul 8 lebih.

(See pp 218–219 of the Appeal Record Vol 2).

(iii) Saya nampak yang buka pintu tersebut adalah lelaki Cina merupai sasaran kami.

(See p 221 of the Appeal Record Vol 2).

**[72]** L/Cpl Samsudin bin Jantan (PW4) in his evidence stated as follows:

ASP Giam memberitahu siapanya suspek, iaitu, satu lelaki Cina bernama Chan King Yu rakyat Hong Kong berada di sekitar Kuala Lumpur. Pemerhatian ini adalah berkenaan kegiatan pengedaran dadah. Arahan adalah buat pemerhatian di Hotel Nova, Jalan Bukit Bintang. Lepas itu, saya lihat satu lelaki bangsa Cina seperti deskripsi yang diberi oleh ASP Giam melalui gambar yang ia beri turun dari Hotel Nova.

(See p 163 of the Appeal Record Vol 2).

**[73]** L/Cpl Abdul Halim bin Basri (PW5) in his evidence stated as follows:

(i) Operasi yang diketuai oleh ASP Giam untuk membuat tangkapan ke atas seorang lelaki Cina rakyat Hong Kong di sebuah hotel di Jalan Alor, Bukit Bintang. Ia Hotel Nova.

(See p 176 of the Appeal Record Vol 2).

(ii) ASP Giam arah untuk standby kerana ada maklumat seorang bangsa Cina lelaki rakyat Hong Kong ada membawa dadah jenis syabu ke kawasan Bukit Bintang. Masa taklimat saya diberitahu ada orang akan membawa syabu.

(See p 183 of the Appeal Record Vol 2).

**[74]** The learned trial judge in his judgment on this issue of acting on information received had stated as follows: A

> Keterangan menunjukkan tertuduh adalah sasaran pihak polis dalam operasi ini dari sejak awal. Pihak polis telah menerima maklumat bahawa seorang lelaki Cina dari Hong Kong akan mengedar dadah 'syabu' pada hari itu dan telah menerima salinan portret tertuduh. B
>
> (See p 118 of the Appeal Record Vol 2).

The Court of Appeal in its judgment had also likewise stated as follows:

> On the morning of 19 June 2000 ASP Giam Kar Hoon (PW7) from the Narcotics Division of Bukit Aman received information that a Chinese male from Hong Kong by the name of Chang King Yu would be trafficking in dangerous drug at a hotel in Kuala Lumpur on that day. C
>
> (See p 6 of the Appeal Record Vol 1). D

**[75]** I am of the view from the above quoted findings in the judgment of the courts it can be said that both the High Court and the Court of Appeal had acted on statements which were clearly hearsay and prejudicial to the appellant and therefore inadmissible. On this point I would like to refer to the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 (FC) wherein Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court had this to say: E

> The penultimate point which arose from consideration concerned the admission of certain irrelevant, inadmissible and gravely prejudicial evidence to wit that part of the testimony of ASP Abdul Wahab wherein he gave an account of the briefing he had given his men on the night before he had mounted the road block to stop and search the car driven by the appellant; more particularly, he said this 'I informed them (his men) that information had been received that a certain Indian would be travelling in a blue Colt Gallant Mitsubishi WBE 2789 and transporting dadah proceeding from Kawasan Permatang Bendahari towards Pulau Pinang.' Now this statement by ASP Abdul Wahab was clearly based on hearsay, was prejudicial to the appellant, and therefore, inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of failure to object. F G H

**[76]** In another case of *Vijayaratnam v Public Prosecutor* [1962] MLJ 106 on a similar point Hashim J at p 106 stated: I

> I think, if possible, the expression 'on information received' should not be used by police officers when giving evidence. It would appear to mean that somebody has given information, which may be hearsay, to the police and the police act on this information. In this particular case, the police witness went on to say that on

arrival at the scene, he laid an ambush. This statement, read in conjunction with the expression 'on information received', would tend to indicate that the police had been told that an offence would be committed. In my opinion this would, to say the least, cloud the issue when the trial commenced and it might to a certain degree prejudice the court against the appellant. To put in another way, there was a probability that the court trying the appellant was to a certain extent, influenced by the opening statement of the police witness. In my opinion, such a state of affairs should be avoided.

(2) *Failure of the police to investigate Man Chai's role/existence*

**[77]** It is the contention of the appellant that despite the name of the person 'Man Chai' was mentioned in the cautioned statement of the appellant ('exh D29'), Man Chai's photograph identified by the appellant and Man Chai's telephone numbers found in the appellant's notebook seized by the police ('exh P11N'), still the police failed or refused to investigate Man Chai. It is also noted that the learned High Court judge and Court of Appeal judges also failed to appreciate the fact that Man Chai's name was mentioned in exh D29. Neither did the learned judges consider that the police had not investigated Man Chai or all of the persons mentioned in exh P11N. On this point the appellant (DW1) in his evidence had stated the following:

> Kawan Michael Chan nama Man Chai ada jemput saya di lapangan terbang apabila saya sampai di Malaysia ... Saya ada bertemu dengan Ken di Johor. Ken ada masuk kereta Man Chai dan beri wang RM30,000 kepada saya ... Michael Chan telah minta saya serah RM25,000 ke Man Chai dan RM5,000 lagi itu untuk perbelanjaan saya di Malaysia. Ken ada disebut di dalam buku ini. Ia itu pelanggan pertama di muka surat 3 di P11N.
>
> (See p 270 of the Appeal Record Vol 2).

**[78]** DW1 further stated as follows:

> Lelaki tersebut tanya saya dalam loghat Kantonis di mana Man Chai. Saya jawab saya tidak tahu dan saya juga beritahu polis saya sedang tunggu dia. Saya tanya pihak polis, boleh tak saya telefon dia. Saya beritahu polis saya ada nombor telefon Man Chai.
>
> (See p 283 of the Appeal Record Vol 2).

**[79]** The prosecution witness PW3, the investigating officer when cross-examined whether he had taken any steps to investigate Man Chai replied that he did not do so wherein he stated as follows:

> Q. Dalam D29, OKT ada cakap bila polis masuk dalam bilik, polis ada cakap mereka cari seorang nama Ah Man Chai. Awak tahu siapa Ah Man Chai?
>
> A. Saya tidak tahu.

Q. Adakah awak buat apa-apa siasatan atas Ah Man Chai

A. Tiada.

(See p 154 of the Appeal Record Vol 2).

**[80]** When further shown exh P11N, PW3 had this to say:

Saya terima P11N pada 20.6.2000. Saya lihat secara kasar sahaja P11N.

Put: If you had gone through this notebook, you would have seen local telephone numbers and names. Kamu ada lihat muka surat 3.

A: Saya tidak buat semakan atas kandungan buku ini.

(See p 157 of the Appeal Record Vol 2).

**[81]** The prosecution witness PW7 when asked if the appellant had mentioned the name Man Chai, he answered in the affirmative. PW7 also stated that he did not investigate or trace the last ten telephone calls recorded in both appellant mobile phones. PW7 had in fact stated that he had switched off the two mobile phones belonging to the appellant that were seized on the day the appellant was arrested. When the following question was put to PW7, his reply was as follows:

Put: Had you not switched off the handphone you would have allowed the appellant to receive a phone call from one Man Chai.

A: Kemungkinan boleh.

(See p 234 of the Appeal Record Vol 2).

**[82]** The appellant in his defence called Shamsidar bt Hashim (DW8), the manager at Pre-Paid Times Cell Sdn Bhd who testified that the police did not make any inquiries about the telephone No 017-5810792 being one of the appellant's telephone seized by the police party from the appellant.

**[83]** I am of the view had the police investigated the local telephone numbers found in exh P11N and the last ten calls made and received as shown in exhs P18 and P19, it would have led to the discovery of the people the appellant was in contact with, and the existence of Man Chai. Man Chai in my view was not a fictitious character. Man Chai had played a key role in leading the police party to effect arrest on the appellant. On this point I would like to refer to the case of *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337; [1998] 2 CLJ 469 wherein the Federal Court at p 347 (MLJ) and p 482 (CLJ) stated:

In this situation, it was certainly open to the defence to contend that if the whole matter had been probed, the judge might have felt unable to accept the police evidence at all on the ground if the testimony of the police witness was unreliable

as to when the accused had made disclosure of his defence, their testimony as to other matters for example, about the bread and iced tea and about the accused dropping the bag might also be unreliable. Had such a submission been made, it might or might have carried weight, but if upheld, it would have led to an outright acquittal.

**[84]** As regards the material particulars relating to the existence of Man Chai which had been disclosed by the appellant in his cautioned statement exh D29 which was made on the day after his arrest, I am of the view that the police had all the time to check as to their veracity. The burden was on the prosecution to check whether the appellant's version of the facts as they appeared in the cautioned statement was true or false. The onus was upon the prosecution to disprove this important part of the appellant's version of facts. The appellant was under no duty to put to the investigation officer the aforesaid material particulars in view of their prior disclosure in the cautioned statement (see the case of *Alcontara a/l Ambross Anthony v Public Prosecutor*).

**[85]** It is also to be noted of the fact that according to the appellant Man Chai asked him to check out of Hotel Midah and checked into Hotel Nova at noon on 19 June 2000 and the action taken by the police ambush party to be at Hotel Nova was also on the same day. On this point the appellant (DW1) testified as follows:

> Pada 19 Jun 2000 saya check-out Hotel Midah jam lebih kurang 11 pagi. Saya check-out selepas saya diberitahu oleh Man Chai. Man Chai suruh saya check-in Nova Hotel … Saya check-in Hotel Nova lebih kurang 12 lebih tengah hari.
>
> (see p 275 of the Appeal Record Vol 2).

**[86]** I am of the view it cannot be merely a coincidence that PW7 who in his evidence said that he received information from the informant at about 12.10pm on 19 June 2000 that the appellant will be at Hotel Nova. This is what PW7 said:

> Sebelum tugas serbuan, pagi hari tersebut saya menerima maklumat dari sumber, maklumat darinya mengatakan satu rakyat lelaki Cina Hong Kong bernama Chan King Yu akan mengedar dadah syabu di sebuah Hotel di Kuala Lumpur ... Dalam lebih kurang 12.10 tengahari, sumber telah menalipon saya dan telah beri nama hotel tersebut, iaitu Hotel Nova.
>
> (see p 193 of the Appeal Record Vol 2).

**[87]** It is the contention of the appellant that when the appellant checked in at Hotel Nova around 12pm, the police raiding party had already received the name of the hotel from the informant. To the appellant the shift from Hotel Midah to Hotel Nova was pre-planned or pre-arranged by Man Chai

and the police. I am of the view on this point from the evidence earlier shown there is a justification to support such a contention by the appellant.

(3) *Drugs planted in Room 1303 and two raids made by the police team*

**[88]** I shall now deal with the more serious allegation made by the appellant against the prosecution's case. The defence had alleged that the police raiding party in this case had 'planted' the evidence against the appellant after they had knowledge of the existence of the incriminating exhibits in the said Room 1303 of Hotel Nova. On this issue it is the contention of the appellant that in actual fact there were two raids made by the police on Room 1303 and not one raid as contended by the prosecution. In the first raid made on Room 1303 the defence contended that the appellant was not present and at this stage it was alleged that the police raiding team had staged a scene by creating an activity which the prosecution relied in order to prove knowledge of the drug in order to establish possession against the appellant. On this point it is to be noted that it is the prosecution's case that when the police ambush party entered Room 1303 and conducted a search they recovered incriminating items placed in the said room and bathroom. The appellant however in his evidence denied knowledge of the incriminating items found and claimed that the police ambush party had planted the evidence of the incriminating items against him.

**[89]** Having carefully considered the evidence adduced as a whole there is a justification to find that the raiding party had actually entered the appellant's room earlier in the absence of the appellant. On this point I am of the view the learned trial judge and the Court of Appeal judges failed to consider the evidence of DW2 and DW3 at all, who were independent witnesses and had no reason or interest to lie. The learned judges chose instead to believe the testimony of PW5 and PW7 who were police witnesses and took part in the raid. Neither did the learned judges give any reason for rejecting DW2's and DW3's evidence.

**[90]** With regard to the first raid that was carried out without the presence of the appellant, DW2 in his evidence stated that at about 8.40pm on 19 June 2000 two officers came to his counter at the Hotel Nova asking the key to Room 1303 saying that they wanted to open the door. DW2 made a key and followed them to the 13th floor. When he arrived at 13th floor he saw about eight police officers about to ambush the room. One of the police officers asked him to see a police officer in Room 1310. DW2 entered Room 1310 and was introduced to a police officer by the name of DSP Yap Seng Hock who told him to open the door to Room 1303 as the police wanted to ambush the said room. DW2 opened the door to Room 1303 and DSP Yap

Seng Hock together with the raiding team entered the room. The police then asked DW2 to go away and DW2 left.

**[91]** DW2 in his evidence further stated that he did not see any member of the police team trying to break the lock to the room door of Room 1303. He did not see the police knocking the door and shout 'police' and did not hear somebody answering in Cantonese. He did not hear the police knocking several times before somebody answered the door. DW2 categorically said that he was the person who opened the door to Room 1303 using his key-card that he had brought along.

**[92]** In support of the evidence of DW2 that he opened the door to Room 1303, the front office manager of Hotel Nova, DW3 testified that a master key in the form of a key-card can open every door. It is carried by the Manager. DW3 has the master key and the front office supervisor will have one as well. The housekeeping staff and the supervisor on duty will also have the room master key. DW3 further testified that if the door is locked from inside it can only be opened by an emergency key. Only two person hold that emergency key and they were DW3 and the hotel manager. If it is used it will be recorded and on 19 June 2000 the emergency key was never used at any time.

**[93]** From the above evidence given by DW2 and DW3 I am of the considered view there are merits in the defence contention that:

(i) DW2 opened the door once at the request of the police using the master key;

(ii) DW2 could not possibly have opened the door with the master key if the door was latched from inside;

(iii) if the door was not latched from inside, the appellant could not have been in the room;

(iv) there was no force used to open the door the first time; and

(v) no voice from inside speaking in Cantonese as contended by the prosecution.

**[94]** It is also to be noted as regards the existence of the first raid in this case as contended by the defence the appellant left the hotel room three times between 12.30pm and 9pm on 19 June 2000 during which time the room could not have been latched from the inside and anyone could have had access to the said room.

**[95]** As regards the second raid there are material contradictions or discrepancies in the evidence of the prosecution witnesses PW5 and PW7 when compared with the evidence by defence witness, DW2. The second raid conducted by the police team as contended by the defence is premised on the presence of the appellant in Room 1303 and that defence witness DW2 who had earlier in the first raid assisted the police team to open the door to Room 1310 was not present. PW5 in his evidence, inter alia, stated as follows:

> Kami sampai ke hotel jam 8 malam. ASP Giam arah team serbuan berada di Hotel Nova dan pada jam 9.00 malam ASP Giam arahkan team serbuan naik ke tingkat 13. Seterusnya ASP Giam telah mengetuk pintu bilik 1303 dan menyebut perkataan 'polis' dalam bahasa Cina. Pintu masih tidak dibuka. ASP arahkan saya pecahkan pintu bilik hotel. Pecahkan pintu dengan pemecah pintu yang dibawa. Tapi pintu tidak dapat dipecahkan dan saya dengar orang menjerit dalam bilik dalam bahasa Cina. Dalam dua atau tiga minit pintu pun dibuka. ASP Giam dan team serbuan terus menyerbu masuk ke bilik ...
>
> (See p 177 of the Appeal Record Vol 2).

**[96]** When cross-examined PW5 further stated as follows:

> Ada ASP Giam cuba memanggil pekerja hotel masuk buka pintu. Kemudian pekerja hotel datang untuk membuka pintu tetapi tidak dapat buka kerana pintu diselak dari dalam. Setelah tak boleh buka ia beredar dari tempat itu. Dia pakai kad kunci ... Kad itu tidak boleh buka.
>
> (See pp 185 and 186 of the Appeal Record Vol 2).

**[97]** PW7 on the other hand in his evidence in cross-examination had stated as follows:

> Kami tunggu di sana sehingga jam 9 malam. 8.50 malam kami dapat berita dari D/Kpl Samsudin bahawa sasaran kami telah masuk hotel. Saya tak nampak OKT masuk bilik.
>
> Saya ketuk pintu bilik tersebut lebih kurang jam 9.15 lebih. Saya hanya percayai OKT masuk bilik lebih kurang jam 8.50 malam. Itu pada pendapat saya. Saya pergi ke depan pintu bilik tersebut dan belum saya ketuk pintu saya telah arah Insp Nizam pergi jumpa pihak hotel untuk mendapat kunci master ... Seorang staff hotel naik ke tingkat. Hotel staff itu tidak pergi ke bilik No 1310. Sebelum hotel staff mari saya belum ketuk pintu. Saya tidak panggil atau ketuk pintu ... Saya telah ambil kad master itu dari staff itu dan telah cuba buka pintu bilik 1303 ... Saya telah cuba dua kali tetapi pintu tidak dapat dibuka. Maka saya syaki pintu telah dikunci dengan latch dari dalam bilik. Master key itu saya telah serah balik ke pihak hotel dan selepas staff hotel beredar dari tingkat 13, baru saya mula ketuk pintu bilik tersebut. Saya dengar suara dari bahagian dari bilik tersebut yang bertanya siapa di pintu dalam bahasa Kantonis. Saya jawab saya kakitangan kerajaan dalam bahasa Kantonis … Pintu itu dibuka selepas kami cuba pecah

masuk pintu tersebut beberapa kali. Selepas suara dalam bilik jawab 'tunggu sebentar' dalam seminit lebih pintu tidak dibuka. Saya minta lagi buka pintu tetapi tidak dibuka. Kemudian saya suruh anggota saya pecahkan pintu.

(See pp 227 and 228 of the Appeal Record Vol 2).

**[98]** Based on the above version of the prosecution's witnesses PW5 and PW7, I am of the view there is a clear fabrication of the evidence because DW2 who is not an interested witness had testified that he opened the door of the Room 1303 only once at the request of the police using the key-card he carried along and there was no force used. Neither was there any knocking, shouting and answering in Cantonese as alleged by the police. Therefore, when the prosecution suggested that DW2 was present during the second raid, it was clearly a lie. Further, if the door to Room 1303 is locked from inside it has already been established in the evidence of DW3 that it can only be opened by an emergency key. On 19 June 2000 the emergency key was never used at any time. As such, if Room 1303 was latched from the inside, the police could have easily requested that the door be opened with the emergency key and there was no necessity to break open the lock to the room door, especially if the police wanted to make a surprise attack on the appellant as testified by PW7. On this issue of discrepancies in the evidence of the witnesses who gave evidence at the trial and the allegation of fabrication of evidence by the prosecution witnesses, I would like to refer to the case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197 wherein Arifin Zakaria FCJ in delivering the judgment of the court at p 206 had this to say:

> The learned trial judge dismissed this as minor discrepancy which he said is expected of any witness and this goes to strengthen the point that they were not fabricating evidence, they were telling the truth. To him, what is important was whether the things containing the drug were in their possession at the material time. However, he went on to say that between the two he would prefer the evidence of SP4, being the first police officer to have entered the room. In this regard, I am in agreement with Abdul Aziz JCA that the discrepancy here is far from being trivial as it pertains to an activity which the prosecution relied on in order to prove knowledge of the drugs in order to establish possession. This discrepancy has to be considered against the evidence of the accused that when SP4 and SP6 entered the room, the first and the third accused were in the standing position. This gives rise to serious doubt on the accuracy of the evidence of SP4 and SP6, that when they entered the room, the first and third accused were sitting down cross legged facing drug. If their attention was in fact focused on what the two accused were doing at the material time, as they claimed, then they could not be seeing to different activities. And it is all the more telling when no empty plastic packet was ever produced in evidence.

(4) *The truth behind the damaged door and the intentional concealment of the role played by DSP Yap Seng Hock*

**[99]** For the appellant it was also argued that there was no necessity for the raiding party to damage the door lock of Room 1303 to such an extent, especially if they could have used the emergency key available. It was submitted for the appellant that the only reason the said door lock of Room 1303 was damaged intentionally to such an extent was to permanently destroy the information registered in the lock as to how many entries that had been made to Room 1303 on 19 June 2000. There is evidence from the testimony of DW3 who stated that the key to the room door 1303 is by using a key-card. Each time the key-card is inserted it will be recorded. However in the present case the lock was damaged and therefore DW3 cannot trace how many times it has recorded on 19 June 2000. I am of the view this piece of evidence would conclusively point to the fact that the raiding party had intentionally destroyed a crucial evidence to cover up the first raid conducted in the absence of the appellant to plant the said drugs and implicate the appellant.

**[100]** In relation to the existence of the two raids conducted by the police team on Room 1303 as contended by the defence I am of the view the defence had also validly raised the issue of the intentional concealment by the prosecution as to the identity and involvement of DSP Yap Seng Hock in the raid. It is to be noted the prosecution witnesses, namely the police officers PW3, PW5 and PW7 repeatedly denied the presence of DSP Yap Seng Hock and his involvement in the raid at Hotel Nova. PW3 in his evidence denied knowing DSP Yap Seng Hock and said that the raiding team only comprised ASP Giam Kar Hoon (PW7), Inspector Ahmad Nizam, Kopral Halim (PW5), DSM Abdullah and Kopral Teoh. PW5 in his evidence stated that he could remember clearly there were only five officers at the front door of Room 1303 and that DSP Yap was not in the hotel on the night of 19 June 2000. PW7 in his evidence, inter alia, stated that after receiving information, he got his raiding team ready comprising DSM Abdullah, D/Kpl Teoh, L/Kpl Abdul Halim, D/Kpl Shamsudin and Inspector Abdul Nizam. On 19 June 2000 the raiding team including PW7 comprised six officers and the six of them were in the room until the appellant was brought out. PW7 also stated that he did not know if there was any police officer in Room 1310. However, when elicited through cross-examination and when shown the hotel print out as in IDD34, PW7 confirmed that Room 1310 was registered under DSP Yap Seng Hock's name on 19 June 2000.

**[101]** On the other hand, directly in contrast to the evidence given by the prosecution witnesses on the issue of the presence of DSP Yap Seng Hock at Hotel Nova on 19 June 2000, the defence had through the evidence of DW2

and DW3 stated that on 19 June 2000 a policeman by the name of Yap Seng Hock came to the hotel and booked the room No 1310. DW2 met DSP Yap Seng Hock at Room 1310 and was briefed by DSP Yap Seng Hock that the police team wanted to ambush Room 1303. DW2 further stated that when he opened the door to Room 1303, DSP Yap Seng Hock was together with the raiding team. DW2 was later asked to go away.

**[102]** The evidence of DW2 that DSP Yap Seng Hock was present at Hotel Nova and in Room 1303 on 19 June 2000 is corroborated by DW3 who had stated that DSP Yap Seng Hock informed him on that day that he (DSP Yap) had occupied Room 1310 for a few hours and this was to enable him to carry out the raid in the hotel. According to DW3, DSP Yap Seng Hock thanked the hotel for cooperation in giving assistance to the police and had requested for the room charges on Room 1310 which he occupied for about three hours be waived.

**[103]** The appellant (DW1) in his evidence, inter alia, stated that there were at least ten police officers in his Room 1303 and during the raid a Chinese man questioned the appellant on Man Chai's whereabouts. The appellant went on to state that the Chinese man who enquired about Man Chai is not in court and there were three Chinese men altogether in the said Room 1303. It should be noted here that the three Chinese in the raiding team must be ASP Giam (PW7), Kpl Teoh and DSP Yap Seng Hock.

**[104]** In the circumstances of the case I am of the view the appellant's contention that DSP Yap Seng Hock was at the scene or even earlier is tenable as he had checked in Room 1310 at 6.30pm on 19 June 2000. DSP Yap Seng Hock was there until the raid was carried out and completed. It cannot be true that PW7 does not know DSP Yap's whereabouts as PW7 admitted that DSP Yap is the coordinator of the operation and PW7 reports to DSP Yap. It must be noted again that the learned judge of the High Court and Court of Appeal judges completely rejected the testimony of DW2 and DW3 and documentary proof as in D34 (the hotel print out stating DSP Yap Seng Hock checked in at 6.30pm) which conclusively showed that DSP Yap had in fact checked into Room 1310 and had actively participated in the raid. The learned judges failed to realise that D34 was not rebutted at all by the prosecution. Again, the learned judges chose to believe PW5 and PW7 who were police officers in the raiding team. I would hasten to add here by stating that there has been a failure by the prosecution to call a material witness, that is DSP Yap Seng Hock to give evidence for the prosecution and hence a justifiable case for the defence to invite for the invocation of adverse presumption under s 114(g) of the Evidence Act against the prosecution's case.

(5) *Disposal of P24 — whether concocted by police*

**[105]** Learned counsel for the appellant had also raised in this appeal on the issue of exh P24 and the contents found therein which the prosecution contended were thrown into the dustbin outside Hotel Nova by the appellant. The complaint of the appellant on this issue is that P24 was not sent to the fingerprint department for analysis at all. P24 contains a very vital piece of evidence, that is the cover or lid that is placed on top of the cylinder in which the drugs were placed. P24 is a material prosecution exhibit imputing the appellant has knowledge of the drugs, and his power to dispose off the same. Despite this, the learned judge of the High Court never once considered the failure of the police to send such a vital piece of evidence in P24 for finger print analysis. If this had been done, it would have pointed to the fact as to whether or not that the appellant had dealt with and handled the drug exhibits. On this point it would not be far fetched to say that the police had not sent P24 for fingerprint analysis because they knew so well P24 was never handled by the appellant and it would be futile exercise as the appellant's fingerprints will never be found in P24. It is the defence case that the disposal of P24 as contended by the police never occurred. It was fabricated for the sole purpose of imputing the appellant had knowledge as to the contents of the cylinder and his power to dispose off the drugs. It is also to be noted that P24 was never mentioned in the report lodged by PW7. PW7 when cross-examined on this point had this to say:

> Q: You gave evidence that a lid of one of the containers was found in the dustbin?
>
> A: Benar. Saya ada buat laporan polis.
>
> Q: In that report did you mention that one of the lids was thrown into the dustbin?
>
> A: Saya tidak ingat.
>
> A: In the report I did not mention that one of the lids was missing.
>
> (See p 223 of the Appeal Record Vol 2).

**[106]** On the purported disposal of P24 by the appellant I am of the view there was no reason for the appellant to dispose P24 into a dustbin outside the hotel. There were dustbins in the room and outside the room along the corridor at the hotel where the appellant could have easily disposed P24 and its contents. Moreover, P24 was discovered at a public dustbin which is accessible to any member of the public.

(6) *Missing items belonging to the appellant*

**[107]** For the appellant it was submitted that a number of personal items

seized by the police team belonging to him were missing and not produced as exhibits at the trial. The pink plastic bag as seen in exh P30A and exh P30B containing VCD was not stated in the search list P28, nor was it produced in court. Other items included ladies handbags, shoes and souvenirs bought by the appellant, which were in Room 1303. These items were also not stated in the search list and had all gone missing. The appellant had also stated that he bought the *Polo* bag (P12) which the prosecution produced as exhibit for the purpose of putting the items and souvenirs he bought in Malaysia to be brought back to Hong Kong.

**[108]** The appellant's evidence on these missing personal items and the *Polo* bag (P12) that he had bought in Kuala Lumpur is corroborated by the evidence of DW4, the appellant's girl friend in Hong Kong who, inter alia, stated that on 19 June 2000 she spoke to the appellant and had requested him to buy for her items such as ladies handbags, shoes and souvenirs. DW4 had also informed the appellant to buy a new bag for putting in those items bought since the appellant had only carried a small bag. DW4's evidence is corroborated by her telephone bills dated 18 June 2000 and 19 June 2000 marked as D37A and D37B.

CONCLUSION

**[109]** Having considered the defence case as against the prosecution case, with all the infirmities and the glaring discrepancies in the prosecution's case as discussed earlier, I am of the firm view that the defence had succeeded in raising a reasonable doubt on the prosecution's case. The appellant from the time of his arrest and throughout the entire trial had consistently maintained that he has no knowledge of the drugs because the three plastic bags found in the hotel Room 1303 in fact belonged to the person named Man Chai and that the appellant genuinely believed that these plastic bags contained tools. From the evidence unraveled in court, it is clear that the defence of the appellant was not a bare denial but an explanation indicating that the alleged drugs could have belonged to Man Chai and Man Chai could have been the trafficker. The appellant at most was only an innocent carrier. In the circumstances, I would allow the appeal herein and set aside the conviction and sentence imposed on the appellant. The appellant is accordingly acquitted and discharged of the charge.

*Appeal allowed. Appellant acquitted and discharged.*

Reported by K Nesan